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IN THE

Supreme Court of the United States

October Term, 1958

No. 198

STATE OF MINNESOTA,

Petitioner,

vs.

ROBERT MORFORD ADAMS, ET AL.,
THE ADAMS CORPORATION, ET AL.,
ADAMS HOLDING COMPANY, ET AL.,
BYRON H. COOLIDGE, ET AL.,
THE ADAMS CORPORATION, ET AL.,
ROBERT M. ADAMS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Minnesota

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Minnesota

Petitioner prays that a writ of certiorari issue to review the judgment of the Minnesota Supreme Court entered in the above entitled case on April 23, 1958.

CITATION TO OPINIONS BELOW

The official opinions of the Minnesota Supreme Court, affirming the district court and denying the State's petition for rehearing, are printed in Appendix A, pp. 23, 57, and are reported, unofficially, in 89 N. W. (2d) 661. No opinion was filed by the District Court of Crow Wing County. Its findings of fact and conclusions of law are reported in the certified record (R. 9-17; 47-56; 74-84; 103-114; 135-146; and 167-176. Findings relating to Big Rabbit Lake are printed in Appendix B, p. 86.[1]

JURISDICTION

The Minnesota Supreme Court, on June 28, 1957, filed its opinion affirming the District Court of Crow Wing County. (App. A, p. 21). A timely petition for rehearing, filed October 28, 1957, was denied on March 14, 1958. (App. A, p. 21). The judgment affirming the district court was entered April 23, 1958 (App. A, p. 78). The jurisdiction of this Court is invoked under 28 U.S.C. § 1247(3), since petitioner believes that the decision denies the State of Minnesota a title and a right specially set up and claimed under the Constitution and statutes of the United States.

QUESTIONS PRESENTED

Navigability for the purpose of determining the ownership of the beds and iron ore under waters forming the Rabbit Lake chain is the issue in this case. The Court below con-

[1]Six separate sets of findings of fact and conclusions of law were filed by the district court relating to six separate actions which were consolidated for trial. Only the first set of findings and conclusions is printed in Appendix A, the others appearing in the record as indicated.

sidered this a federal question determinable solely by federal law. On petition for rehearing, the State argued that the Court had misconstrued the federal law and, in addition, that the case was governed by local law. The questions presented are:

1. Assuming the question of ownership to be governed by federal law, whether the Supreme Court of Minnesota misconstrued the federal law and controlling facts of navigability when it held this watercourse non-navigable on the grounds that it was interrupted between its navigable parts; was never actually used for commercial purposes; was so located that it could not, in 1858, have provided a channel for useful commerce and that tourist and recreational uses are not included within the term "commerce";

2. Whether Minnesota is deprived of rights of sovereign dominion and jurisdiction over its lands and waters contrary to Article IV, sec. 3, of the United States Constitution and the Act of Congress admitting Minnesota to statehood on an equal footing with other states, when the Court below assumed that it was compelled by decisions of this Court to declare non-navigable by federal law, and therefore subject to private ownership, meandered lakes characterized as navigable and public by state law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Federal Constitutional provision involved is Article IV, § 3. The statutory provision involved is Act of May 11, 1858, 11 Stat. 413. They are printed in Appendix [illegible] p. 95.

STATEMENT

(The Record from the district court consists of four volumes of transcript and one volume of pleadings, findings of fact and conclusions of law. References indicated by (R) are references to the pages of that printed record. Proceedings in the Court below are printed in Appendix A.)

The ultimate issue in this case is ownership of the beds, and therefore the iron ore, under the waters of the Rabbit Lake chain. It was stipulated that navigability would determine that issue [R. 10 (App. B, p. 87)]. By Minnesota law, riparians own the adjoining submerged lands if the overlying waters are nonnavigable. The beds of navigable waters belong to the State.[2] The defendants claimed the beds of these waters and the iron ore contained therein as littoral owners of the uplands adjoining the lakes in question. All of the federal patents involved in this case were granted after statehood. Petitioner brought six actions to determine adverse claims involving six separate lakes and their connecting waters, which were consolidated for trial. [Fdg. II, R. 9 (App. B, p. 87)] The waters in question are described and located geographically by Pltf's Ex. 75, 76, 95 and 97 (App. D, pp. 136-139). The chain commences with

[2] By the law of Minnesota, waters which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year, and waters useful for recreational purposes such as boating, fishing, sailing, are public navigable waters of the State. Lamprey v. State, 52 Minn. 181, 199, 53 N. W. 1139, 1143.

Minn. Laws 1909, c. 49: "* * * all iron ores and other minerals on, in or under lands within this state, which lie beneath the waters of meandered public lakes and rivers belong to the state, * * *." The words "meandered public lakes and rivers" were changed to "navigable lakes and rivers" by Minn. Laws 1947, c. 521, 1 Minn. Stat. § 93.06 (1957).

Big Rabbit Lake and flows into Clinker, Curley (or Turner), Mahnomen,[3] Pascoe, and Little Rabbit; the latter terminating in a confluence with the Mississippi River. Little Rabbit Lake and its outlet stream was found navigable by virtue of its proximity to and connection with the Mississippi River, and therefore owned by the State. (Fdg. XV, R. 174) It is not involved in this petition.

Big Rabbit, Mahnomen and Pascoe lakes were meandered in the original government surveys. Their respective areas are 1160 acres [Fdg. VII, R. 12, f. 3 (App. B, p. 89)]; 400 acres (Fdg. VII, R. 105, ff. 2, 3); and 70 acres (Fdg. VI, R. 136, f. 3). Clinker and Curley (or Turner) were not meandered by that survey. Their areas are 84 acres (Fdg. VI, R. 48, f. 3) and 68 acres (Fdg. VI, R. 75, f. 3), respectively. The federal patents bordering on the meandered lakes were by fractional government lots. [Fdg. V, R. 11; Fdg. IV, R. 104; Fdg. IV, R. 135; Fdg. IV, R. 166 (App. B, p. 88)] The waters in question were originally part of the Rabbit Lake Reservation. [R. 42, 43 (App. A, p. 47)] A survey of the Reservation made in 1857 [Pltf's Ex. A (App. D, p. 102)][4] indicates a connected watercourse extending from Big Rabbit Lake to the Mississippi River. Plaintiff's Ex. C, F, L, N, O (App. D, pp. 105 to 126) relate to early logging operations in the area. In Plaintiff's Ex. N, one Garcelon stated by affidavit dated January 25, 1862, that the lakes and streams within Rabbit Lake Reservation

[3]Erroneously designated as Rabbit Lake on the original government survey. [Fdg. IV, R. 10 (App. B, p. 88)]

[4]Exhibits A to R are photostatic copies of documents and letters from The National Archives, Washington, D. C. They were filed with the district court in support of petitioner's motion for amended findings or a new trial, and were considered by the court to the same extent as though they had been received in evidence upon the trial of these cases. (Order denying Pltf's Motion, IV, R. 44, ff. 2, 3)

were used for floating out of logs. (App. D, p. 119[5]. While the trial court found "that there is evidence" that a dam had been constructed in the stream between Pascoe and Little Rabbit Lake [Fdg. XIV, R. 143, f. 3], it was not persuaded that the dam was used to float out logs. The district court found that the 500-foot outlet channel connecting Big Rabbit Lake to the waters running into the Mississippi River was man-made "sometime after the original . . . survey [in] 1871" [Fdg. VII, R. 12, f. 3; R. 13 (App. B, p. 89)]; and that the watercourse, according to the government survey made in 1869 and 1871, was interrupted between its navigable parts. (App. B, p. 90) The district court found that Big Rabbit Lake had never been used for purposes of logging; that the absence of a natural outlet made it unsuitable for useful navigation [Fdg. IX, R. 15 (App. B, p. 92)]; that such use as was made of these waters for travel, was not for commercial purposes. [R. 16, ff. 2, 3; R. 17, f. 1; R. 17, f. 2 (App. B, p. 92)] Virtually the same findings were made with respect to Clinker, Curley (or Turner), Mahnomen and Pascoe lakes and their connecting waters.[6]

In affirming the district court, the Court below noted that the Rabbit Lake chain extends for about ten miles in length from Big Rabbit Lake to the Mississippi River, and that its depth varies from 0 to 40 feet. (App. A, p. 28) Both courts agreed that the waters had been used for recreational

[5]See also Ex. O, letter to H. L. Moss, U. S. District Attorney, dated January 27, 1864 (App. D, p. 124), wherein reference is made to the use of these waters for logging purposes.

[6]In the interest of brevity those findings will be noted only for location in the record. (Clinker Lake, Fdg. X, R. 52, f. 3; Curley Lake, Fdgs. VIII, R. 77, f. 3; IX, R. 78, f. 3; Mahnomen Lake, Fdgs. VI, R. 104, f. 1; XII, R. 111, f. 3; XIII, R. 112, f. 2; XIV, R. 112; XV, R. 113, and Pascoe Lake, Fdgs. IX, R. 139; X, R. 140; XIV, R. 143; XV, R. 144; XVI, R. 145.)

purposes such as boating, fishing, hunting, and tourist trade. [R. 17, f. 1; R. 112, f. 1; (App. A, p. 51)].

The Court below considered navigability a federal question determinable by federal law (App. A, p. 27), and concluded that the watercourse, even if improved artificially, would not meet the test for navigability laid down in the federal courts. (App. A, p. 45) While the physical characteristics of the waters in terms of area and depth were deemed sufficient (App. A, p. 52), the Court decided that because of their location, they afforded no highway or avenue of practical importance for useful commerce in 1858. (App. A, p. 52) On petition for reargument,[7] the State claimed that the Court had misconstrued the federal test of navigability and in addition urged that the question raised by the pleadings was not controlled by federal decisions, but rather that it was determinable by the law of the State. In denying the petition for reargument, the Court below considered and determined this latter contention adversely to the State.

HOW FEDERAL QUESTION IS PRESENTED

The State alleged in its complaint that the waters involved in this case are navigable and therefore, when admitted to statehood, it became the sovereign owner of the beds. [R. 3, 7, 8 (App. B, pp. 81-85)][8] The district court found that, with the exception of Little Rabbit Lake and its confluence with the Mississippi River (R. 166), the waters, on May 11, 1858, were not susceptible of being used as a highway of commerce. [R. 17, ff. 2, 3 (App. B, p. 93)] Petitioner

[7]The State's petition for reargument is in two parts and, together with reply of petitioner to respondents' brief in opposition to petition for reargument, has been filed with the clerk of this Court. Part II of that petition urges that title to submerged lands, in this case, is determinable by local law.

[8]Identical allegations were made in the complaints relating to the other five bodies of water.

moved for amended findings on the grounds that the court's findings and order for judgment were contrary to law. (R. 18, ff. 2, 3; R. 19, ff. 1, 2) Petitioner appealed from the order denying that motion and, after the Court below affirmed the district court, sought a rehearing on the grounds that the appellate court in affirming the trial court, had misconstrued the federal test of navigability by an overnarrow interpretation. (Pet. for Rearg., Part I, pp. 5, 11-18, Part II, p. 4-12)

The State's claim of sovereign ownership arises out of an act done by the United States. The denial of a title based on such an act raises a federal question. *Mobile Transportation Co. v. Mobile*, 187 U.S. 479. In its first opinion, the Court below, in discussing the applicable rules of law, said:

> "The question of navigability is to be determined by Federal law. As stated in United States v. Holt State Bank, 270 U. S. 49, 55, . . .
>
> "' . . . Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.'" (App. A, p. 27)

The Court below sought the legal criteria to establish navigability in *United States v. Appalachian Power Co.*, 311 U.S. 377, and *The Daniel Ball*, 77 U.S. (10 Wall.) 557. (App. A, p. 43)

This Court has said that where it clearly appears from the state court's opinion that it assumed a federal question to be in issue and proceeded to decide the question against the claim asserted, there is jurisdiction to review that decision. *Haire v. Rice*, 204 U. S. 291, 299; *San Jose Land &*

Water Company v. San Jose Ranch Company, 189 U. S. 177. Where a state court holds that a federal question is before it, and proceeds to determine it, the federal issue is duly presented. *Charleston Federal Savings & Loan Ass'n v. Alderman*, 324 U. S. 182, 185; *Miedreich v. Lauenstein*, 232 U. S. 236.

Petitioner sought a rehearing on the choice of law question when it became apparent that the Court below had construed the federal law to require that waters, to meet the test of navigability, must be located in an area where in 1858 they could have been utilized for commercial purposes without substantial improvement. (App. A, pp. 45, 51-54.) Petitioner, on rehearing, called the court's attention to the decisions of this Court in *U. S. v. Appalachian Power Co.*, supra, and *U. S. v. Utah*, 283 U. S. 64. (Pet. for Rearg., Part II, p. 4-10.) *In view of the construction of federal law adopted by the Court below, the characterization of the question as federal or local becomes crucial to the determination of the State's ownership of its submerged lands.*

The State, in its petition for rehearing, pointed out that the question in this case is controlled by *Marshall Dental Mfg. Co. v. Iowa*, 226 U. S. 460, *Hardin v. Shedd*, 190 U. S. 508, *Hardin v. Jordan*, 140 U. S. 371, *Mitchell v. Smale*, 140 U. S. 406, and *Shore v. Shell Petroleum Corp.*, 60 F. (2d) 1 (10th Cir. 1932), cert. denied, 287 U. S. 656, and therefore determinable by the law of Minnesota. There is in this case no claim, either by the United States or Indian allottees, that the submerged lands were reserved, *U. S. v. Holt State Bank*, 270 U. S. 49, or that they were granted prior to statehood. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77; *U. S. v. Champlin Refining Co.*, 156 F. (2d) 769 (10th Cir. 1946); affirmed per curiam, 331 U. S. 788.

In denying the petition for rehearing, the Minnesota Supreme Court specifically considered and determined this contention as indicated by the following words:

> "But as to applicable legal principles the state now takes the position that the *Federal* tests for determining navigability of waters should *not* have been applied, but that some more liberal *state* rule should govern therein. Aside from the merits of this contention which will be considered later, the rule is well established that a party may not try his case under a legal theory chosen by him, and, being unsuccessful therein, subsequently complain upon appeal here that such chosen theory was really not the correct one after all. However, in view of public interest in this case and because of certain misleading impressions therein created through publicity releases *emanating* from the attorney general's office, we shall herewith consider and determine this present contention of the state notwithstanding that it is directly opposite to the position under which the case was tried and submitted by it." (Underline supplied.) (App. A, p. 61)

The Court then reaffirmed its prior declaration by stating:

> "* * * With respect to applicable law for determination of the question, the Supreme Court of the United States said, (283 U. S. 75, 51 S. Ct. 440, 75 L. ed. 849):
>
> "'* * * The question of navigability is * * * determinative of the controversy, *and that is a federal question.* * * * *State laws cannot affect titles vested in The United States.*'" (App. A, p. 64)

The Court below made it clear that in applying federal law it did not adopt that law as the law of the state, but rather, that it deemed itself compelled by this Court's decisions to reject the law of the state. The Court said:

"* * * the conclusion is inescapable that what Minnesota owned in its sovereign capacity as a state upon admission to the Union and what was retained by the United States as part of the Public domain clearly involves a Federal question. *Whatever we may have assumed the law to be prior to United States v. Holt State Bank, supra, it is clear that since that decision* the waters over which Minnesota may assert ownership as an incident of statehood due to their navigability *must be determined* under Federal law. * * *" (Emphasis added.) (App. A, p. 74)

This Court has declared that a federal question, when raised on petition for rehearing, does not come too late where the court actually considers and determines that question. *Radio Station WOW v. Johnson*, 326 U. S. 120; *Forbes v. State Council*, 216 U. S. 396; *Mallett v. North Carolina*, 181 U. S. 589. Petitioner believes also that the unexpected construction given the federal law by the Court below brings the case within the rule of *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673.

This Court's jurisdiction to review the asserted misconstruction of federal law is supported by *Steele v. L. & N. R. Co.*, 323 U. S. 192 and *Murray v. Gerrick & Co.*, 291 U. S. 315. Neither the first nor second opinion of the Court below rests upon an adequate nonfederal ground, but in both opinions the Court, deeming the federal question to be before it, considered and decided the question without reference to the law of the State. *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95; *International Steel & Iron Co. v. National Surety Co.*, 297 U. S. 657. It is clear from both opinions that the Court below felt compelled by decisions of this Court to

apply federal law to determine the case. If the State Court is wrong, it should be relieved of that compulsion. *Missouri ex rel. Southern Ry Co. v. Mayfield*, 340 U. S. 1.

REASONS FOR GRANTING THE WRIT

1. The Court Below Construed the Federal Test of Navigability in a Manner That Conflicts With Decisions of This Court.

Interruption of flow between its navigable parts and lack of proof of commercial utilization is no bar to a finding that the Rabbit Lake watercourse, in 1858, was navigable under the federal rule. This Court, in *U. S. v. Holt State Bank*, 270 U. S. 49, 57, held navigable under the federal rule a lake which, in its natural and ordinary condition, was only from three to six feet deep. It pointed out that navigation was limited "because trade and travel in that vicinity were limited"; that shallows or temporary obstructions do not destroy navigability; nor is it necessary that actual existence of useful commerce at the time the state was admitted be proved in order to establish the navigable character of a watercourse. A state is not to be denied the beds of its waters where such absence of commerce is explainable by conditions of "exploration and settlement." *U. S. v. Utah*, 283, U.S. 64, 82. The definition adopted by the Court below is drawn from cases which measure the ambit of the federal jurisdiction over waters under the power to regulate commerce among the states. A definition of such waters is given

in 16 U.S.C. § 796(8).[9] This statute was construed in *U. S. v. Appalachian Power Co.*, 311 U. S. 377, 409, where this Court said: "Small traffic compared to the available commerce of the region is sufficient."

The evidence in the record through which petitioner attemped to prove the existence of useful commerce in 1858, is voluminous. This Court has said that it will review findings of fact by a state court where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. *Northern Pac. Ry. v. North Dakota*, 236 U. S. 585; *Creswill v. Knights of Pythias*, 225 U. S. 246. And in *U. S. v. Appalachian Power Co.*, supra, the findings of two courts below were reviewed to determine whether the courts had correctly applied to the facts found the proper legal tests.

Petitioner contends that even without resolving conflicts in the evidence, facts of which this Court may take judicial notice (Pltf's. Ex. 75, 76, 95, 97, and Ex. A through O, (App. D, pp. 103-133) require the conclusion that these waters are navigable. *Wear v. Kansas*, 245 U. S. 154. Such a determination has already been made with respect to Big Rabbit

[9] "'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

Lake. (App. D, pp. 129-135)[10] When once found to be navigable, a waterway remains so. *U. S. v. Appalachian Power Co.*, supra. The fact is of a kind that should be established once for all, not perpetually retried, and once determined, becomes a rule of property in the state. *Wear v. Kansas*, supra, 158.

2. In Characterizing the Question in This Case as Determinable by Federal Law, the Court Below Is in Conflict With Applicable Decisions of This Court and Other Federal Courts.

The Court below improperly characterized the question before it when it held, on the authority of *U. S. v. Holt State Bank*, supra, that navigability, in this case, is determinable by federal law. In the *Holt Bank* case, and in *U. S. v. Oregon*, 295 U. S. 1, and *U. S. v. Utah*, 283 U. S. 64, the question was *whether the United States* had relinquished sovereignty and jurisdiction over certain waters upon admission of those states to the Union. But the case at bar is controlled by *Hardin v. Jordan*, 140 U. S. 371; *Mitchell v. Smale*, 140 U. S. 406; and *Hardin v. Shedd*, 190 U. S. 508. These cases hold that when land bounding waters navigable or non-navigable is conveyed by a federal patent the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies. **The issue in this case is whether the riparian patentees received, as an incident of their patent, the adjoining submerged lands, not whether the United States relinquished the beds of these waters to Minnesota in 1858.** *Wilcox v. Jackson*, 13 Pet. 496, 516;

[10] Prior proceedings on an application for a permit to drain a portion of Big Rabbit Lake in order to mine the ore established that the lake was navigable under both the federal and state test of public navigable waters. (App. D, p. 129, 133)

Shore v. Shell Petroleum Corp., 60 F. (2d) 1 (10th Cir. 1932), cert. denied, 287 U. S. 656.

The Court below assumed that the case of *Hardin v. Jordan* had been overruled by *U. S. v. Holt State Bank*. (App. A, p. 71) For this proposition the Court relied upon an article by Professor Bade.[11] (App. A, p. 64) But neither this Court,[12] the federal courts,[13] nor the Bureau of Land Management, 55 L.D. 310,[14] would agree with Prof. Bade or the Court below that *Hardin v. Jordan* has been overruled.

If the ownership of submerged lands is determinable by state law, and if navigability is put in issue for the purpose

[11] Bade, *Title, Points and Lines in Lakes and Streams*, 24 Minn. L. Rev. 305, 313.

"* * * If any doubt remained that the United States Supreme Court had changed its views as to the law applicable to the determination of navigability vel non, United States v. Holt State Bank dispelled it."

[12] *U. S. v. Oklahoma Gas Co.*, 318 U.S. 206, 209: "It is well settled that a conveyance by the United States of land which it owns beneficially * * * is to be construed, in the absence of any contrary indication of intention, according to the law of the State where the land lies."

[13] Choctaw & Chickasaw Nations v. Seay, 235 F. 2d 30; U.S. v. Champlin Refining Co., 156 F. 2d 769; Humble Oil & Refining Co. v. Sun Oil Co., 190 F. 2d 191; Shore v. Snell Petroleum Corp., 60 F. 2d 1; State of South Carolina v. South Carolina E. & Gas Co., 41 F. Supp. 111; Ne-Bo-Shone Assn. v. Hogarth, 7 F. Supp. 885.

[14] "It is urged, however, that the force of these prior rulings no longer obtains since the very recent decision, rendered on April 1, 1935, by the Supreme Court in the case of United States v. Oregon (Vol. 79, page 573, L. ed., 295 U.S. 1). This contention cannot be admitted. Nothing is found in that decision to disturb the former cases hereinabove cited. On the contrary, there is an express reaffirmance of the established rule. This is shown succinctly in headnote No. 15, and is stated in the body of the opinion, with reference to lands under non-navigable waters, as follows:

"'It is true, as was specifically pointed out in Oklahoma v. Texas, supra (258 U.S. 594, 596, 66 L. ed. 779, 780, 42 S. Ct.

of determining ownership, then *a fortiori* navigability must be a question of local law.

3. In Requiring Questions of Title to Be Determined by Federal Law, the Court Below Denies to Minnesota Federal Rights Granted When It Was Admitted on an Equal Footing With the Original States.

When Minnesota was admitted to statehood on an equal footing, she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. *Escanaba Co. v. Chicago*, 107 U. S. 678, 688. See also *Coyle v. Oklahoma*, 221 U. S. 559. Among the attributes of sovereignty is dominion by the state over its navigable waters, *Pollard's Lessee v. Hagan*, 3 How. 212, and legislative authority over all lands within its borders. *Wilson v. Cook*, 327 U. S. 474. Each state has authority to establish such rules of property relating to the beds of its waters as it deems expedient. *U. S. v. Cress*, 243 U. S. 316, 319.

In denying the applicability of state law, the Court below denies to petitioner rights of sovereignty and jurisdiction over its submerged lands guaranteed by the "equal footing" clause in the act admitting Minnesota to statehood. *U. S. v.*

> 406), that the disposition of such lands is a matter of the intention of the grantor, the United States, and "if its intention be not otherwise shown it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies." This was the effect of the decisions in Hardin v. Jordan, 140 U.S. 371 * * * in which conveyances bounded upon the waters of a non-navigable lake were, when construed in accordance with local law, held impliedly to convey to the middle of the lake.'
>
> "In [U. S. v. Oregon] however, the facts were that the lands within the meander line had been withdrawn and reserved prior to the effective date of the grant to the State."

Texas, 339 U. S. 707, 716; *Pollard's Lessee v. Hagan*, 3 How. 212. This is not a case of an attempted forfeiture to the State by legislative or judicial fiat. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77; *U. S. v. Champlin Refining Co.*, 156 F. (2d) 769. Having patented these uplands after statehood without reservation or restriction, the United States relinquished to the State sovereignty and jurisdiction over the adjoining beds. In such a case, whether or not the adjoining submerged lands passed is a question of local law. *Hardin v. Jordan*, 140 U. S. 371; *Lee Wilson & Co. v. U. S.*, 245 U. S. 24.

In asserting its sovereign right to the beds of these waters, Minnesota, as successor sovereign, asserts that by its law these waters are not susceptible of private ownership because they are navigable public waters of the state. The state's ownership then rests upon a denial, by state law, of the riparian title to the bed; the federal government having relinquished all rights to these waters. *Brewer Elliot Oil & Gas Co. v. United States*, supra, 89; *Lee Wilson & Co. v. U. S.*, *supra*. The *federal* law of navigability is applicable where the state denies the power of the federal government to exercise jurisdiction over submerged lands deemed navigable by the state. *U. S. v. Holt State Bank*, supra.

4. The Question Raised by This Petition Is Important to Minnesota and to Other States That Have Valuable Resources in Submerged Lands.

Wisconsin, by its law, claims title to the beds of all lakes and ponds within her borders,[15] and this Court has recog-

[15] Illinois Steel Co. v. Bilot, 190 Wis. 418, 84 N. W. 855, 856:

"* * * A government patent of land bordering on a lake or pond, regardless of the boundaries thereof according to the government survey, does not convey title to the lands below the line of ordinary high-water mark. The United States never had title, in the Northwest Territory, out of which this state was carved, to the beds of lakes, ponds and navigable rivers, except in trust for public purposes."

nized that, by the law of Iowa, riparians take title under a federal patent only to the water's edge. *Marshall Dental Mfg. Co. v. Iowa*, 226 U. S. 460. If the decision of the Court below is permitted to stand, long settled rights of the states to their submerged lands will be open to doubt.

Submerged lands constitute about one-twentieth of Minnesota's total area. Underlying its lakes are vast deposits of mineral wealth. Rabbit Lake alone is estimated to contain between 7 and 10 million tons of iron ore. [Defdt's. Ex. 139 (App. D, p. 129)] This Court will know judicially that Minnesota's lakes and streams are among its most important and valuable natural resources, forming the basis of a flourishing tourist trade of commercial importance to the state. The Court below recognized the importance of the question presented. (App. A, p. 26, 60) It would be impossible to prove, by evidence, the existence of useful commerce in 1858 over many of these waters. Yet, without grant, possession or prescription, and without ever having been taxed for the value of these lands, the rule applied by the Court below would vest in the riparian owners these valuable mineral deposits, and as a necessary result, extinguish the public right to the free use of the overlying waters.[16]

[16] Lamprey v. Danz, 86 Minn. 317, 324:

"It is elementary that every person has exclusive dominion over the soil which he absolutely owns; hence such an owner of land has the exclusive right of hunting and fishing on his land, and the waters covering it. * * *"

State v. Bollenbach, 241 Minn. 103 (Syllabus):

"The right to hunt and fish is an incident of ownership of soil. Every person has exclusive dominion over the soil which he absolutely owns; hence, such an owner of land has the exclusive right of hunting and fishing on his land and the waters covering it."

CONCLUSION

It is apparent that the Court below has read this Court's decisions in the *Brewer-Elliott, Holt State Bank, U. S. v. Utah* and *U. S. v. Oregon* cases as reversing *Hardin v. Jordan, Mitchell v. Smale* and *Hardin v. Shedd.* The conflict between the decision of the Court below and cases from the Federal Courts, and the assertion in a learned journal that this Court misunderstands its own decisions[17] demonstrates the need for further guidance on this important question of the extent of the State's sovereign right in its submerged lands. The State is not estopped by the theory of law adopted by its officers. *Hennepin County v. Dickey,* 86 Minn. 331; *U. S. v. California,* 332 U. S. 19, 39.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the Supreme Court of the State of Minnesota, commanding that Court to certify and send to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered 53 and entitled STATE OF MINNESOTA v. ROBERT MORFORD ADAMS, et al., THE ADAMS CORPORATION, et al., ADAMS HOLDING COMPANY, et al., BYRON H. COOLIDGE, et al., THE ADAMS CORPORATION, et al.,

[17] Bade, *Title, Points, and Lines in Lakes and Streams,* 24 Minn. L. Rev. 305, 317.

"In the light of the recent United States Supreme Court decisions heretofore mentioned, it would seem that state courts generally have misapprehended the purport and effect of Hardin v. Jordan.

"Lamprey v. State (1893), 52 Minn. 181, 192, 53 N. W. 1139, 1140, 38 Am. St. Rep. 541, 18 L. R. A. 670 is a complete expression of this misconception. It runs through the Minnesota cases thenceforth. In fairness to the state courts let it be said that the federal courts, including the federal supreme court, entertained the same view." (footnote)

ROBERT M. ADAMS, et al., and that the judgment of the Supreme Court of the State of Minnesota may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and meet.

MILES LORD
Attorney General
MELVIN J. PETERSON
Deputy Attorney General
VICTOR J. MICHAELSON
Special Assistant
Attorney General
SYDNEY BERDE
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Attorney General
102 State Capitol
Saint Paul 1, Minnesota
Counsel for Petitioner

APPENDIX A

RECORD OF PROCEEDINGS IN MINNESOTA SUPREME COURT

CLERK'S CERTIFICATE AS TO RECORD

STATE OF MINNESOTA IN SUPREME COURT

STATE OF MINNESOTA,

Appellant,

36844-5-6-7-8-9 vs

ROBERT MORFORD ADAMS, ET AL. (36844);
THE ADAMS CORPORATION, ET AL. (36845);
ADAMS HOLDING COMPANY, ET AL. (36846);
BYRON H. COOLIDGE, ET AL. (36847);
THE ADAMS CORPORATION, ET AL. (36848);
ROBERT M. ADAMS, ET AL. (36849);

Respondents.

I, MAE SHERMAN, Clerk of the Supreme Court of the State of Minnesota, and custodian of the records thereof, do hereby certify the record in the above entitled cases, consisting of the following:

1. Printed record consisting of:
   Volumes I, II, III, and IV; 2073 pages of testimony.
   Volume V; 199 pages of pleadings.
2. Opinion filed June 28, 1957; 28 pages.
3. Printed Petition for Reargument consisting of:
   Part I; 152 pages.

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Part II; 73 pages.

4. Printed Brief of Respondents in Answer to Petition for Reargument; 94 pages.
5. Printed Reply of Petitioner to Respondent's Answer; 45 pages.
6. Opinion filed March 14, 1958; 18 pages.
7. Judgment in each case; 12 pages.

I further certify that the foregoing is a true, full and complete transcript of the record and proceedings and the opinions of this court in the above entitled cases as the same now appear on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at my office in the City of Saint Paul, Minnesota, this 2nd day of July, 1958.

MAE SHERMAN
Clerk of Supreme Court of Minnesota

(Seal)

APPENDIX A

OPINION OF SUPREME COURT

No. 53
Crow Wing County
Magney, Commissioner

Endorsed
Filed June 28, 1957
Mae Sherman, Clerk
Minnesota Supreme Court

STATE OF MINNESOTA,

Appellant,

36844-5-6-7-8-9 vs.

ROBERT MORFORD ADAMS, ET AL. (36844);
THE ADAMS CORPORATION, ET AL. (36845);
ADAMS HOLDING COMPANY, ET AL. (36846);
BYRON H. COOLIDGE, ET AL. (36847);
THE ADAMS CORPORATION, ET AL. (36848);
ROBERT M. ADAMS, ET AL. (36849),

Respondents.

SYLLABUS

1. In reviewing findings of fact, the rule in this state, prior to the adoption of Rule 52.01 of the Rules of Civil Procedure, has been that findings must be upheld if they are reasonably sustained in the light of the evidence as a whole, and the new rule, although differently worded, makes

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no practical change in the method of review nor was one intended.

2. The ownership of the beds of navigable waters was granted to the State of Minnesota upon its admission to the Union on May 11, 1858.

3. Question of navigability is to be determined by Federal law.

4. The Federal rule is that streams which are navigable in fact are navigable in law; that they are navigable in fact when they are used or are susceptible of use in their ordinary and natural condition as highways for commerce; that ordinary and natural conditions refer to volume of water, the gradients, and the regularity of flow; and that a waterway otherwise suitable for navigation is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.

5. Under the facts in this case, viewed in the light of the Federal test of navigability, the Rabbit River watercourse was not navigable at the time Minnesota was admitted to the Union; therefore the ownership of the stream bed is not in the state.

6. Under the facts in this case, viewed in the light of the Federal test of navigability, Rabbit Lake was not navigable at the time Minnesota was admitted to the Union; therefore the ownership of the lake bed is not in the state.

7. The susceptibility of a lake for use as a highway for useful commerce is determined mainly by two factors: (1) Whether the body of water has physical characteristics which permit and are conducive to water commerce; and

(2) whether the body of water is situated in a location useful to commercial trade or travel.

8. Prior proceedings relating to the use of the waters of Rabbit Lake are not res judicata here and do not create an estoppel as against any defendant.

Orders affirmed.

OPINION

MAGNEY, Commissioner.

Six actions were brought by the State of Minnesota to determine adverse claims to the beds of certain lakes and connecting streams in Crow Wing County. The state alleged that it was the owner in fee simple of the lands constituting the beds of these lakes and streams. The riparian owners answered and alleged that, since the waters involved were nonnavigable, they were the owners in fee simple of the beds of these waters. The actions were consolidated for trial. By stipulation, the court limited the issue for determination to the navigability of the waters involved, leaving for future determination the boundary lines between lake and stream beds and riparian lands. The importance of these cases lies in the fact that the lake and stream beds involved are underlaid with valuable iron ore deposits. The court found all the lakes and streams involved nonnavigable waters and the title to the beds therefore in the riparian owners, except in the case of Little Rabbit Lake and the channel between it and the Mississippi River (case No. 36,848). Appeals were taken by the state from the orders of the court denying its motions for orders amending the findings of fact and conclusions of law or granting new trials.

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The record is voluminous and the facts numerous. Because of the importance of this litigation, it has been deemed desirable and probably necessary to set out the facts more in detail than in the average case, with the hope, also, that such procedure will present as clear a picture of the situation as it is possible to do in words.

Rules of Law Involved

1. In State, by Burnquist, v. Bollenbach, 241 Minn. 103, 109, 63 N. W. (2d) 278, 283, we said:

> "In reviewing findings of fact, the rule in this state prior to the adoption of the new rules of civil procedure has been that the findings must be upheld if they are reasonably sustained in the light of the evidence as a whole. * * * Although now, by virtue of Rule 52.01 [Rules of Civil Procedure], the criterion for review is whether or not the findings are clearly erroneous, there is no practical change in the method of review of findings of fact nor was one intended. 2 Youngquist & Blacik, Minnesota Rules Practice, p. 648."

As the questions raised by the state in these appeals involve the sufficiency of the evidence to sustain the findings of the court, we must review the record with the above rule in mind.

2. The ownership of the beds of navigable waters was granted to the State of Minnesota upon its admission to the Union on May 11, 1858. The title to all other lake and stream beds remained in the Federal government. State v. Longyear Holding Co. 224 Minn. 451, 29 N. W. (2d) 657; Bingenheimer v. Diamond Iron Min. Co. 237 Minn. 332, 54 N. W. (2d) 912; State, by Burnquist, v. Bollenbach, 241 Minn. 103, 63 N. W. (2d) 278.

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3. The question of navigability is to be determined by Federal law. As stated in United States v. Holt State Bank, 270 U. S. 49, 55, 46 S. Ct. 197, 199, 70 L. ed. 465, 469:

> "* * * Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts."

The Minnesota cases above cited recognized and applied this rule.

4. In Bingenheimer v. Diamond Iron Min. Co. *supra*, we reviewed quite fully the Federal cases which have considered the question of navigability. It would therefore seem unnecessary to do so again. After such a review, we stated that, under the Federal decisions as we understood them, the rule is that streams or lakes which are navigable in fact are navigable in law; that they are navigable in fact when they are used, or are susceptible of use, in their ordinary and natural condition as highways for commerce; that ordinary and natural conditions refer to volume of water, the gradients, and the regularity of flow; and that a waterway otherwise suitable for navigation is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Before applying this test, we must determine what the facts are to which the test must be applied.

General Description of the Waters Involved

5. The Rabbit Lake chain of lakes and streams, also called the Rabbit Lake basin, extends generally in a southwesterly and northeasterly direction, a short distance east

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of the Mississippi River and some miles to the north of the city of Brainerd. It is about 10 miles in length. At the top of the chain (the north end) lies Rabbit Lake, the largest body of water involved. It has an area of 1,160 acres and consists of 2 so-called bowls, connected by a channel about 700 feet wide and 12 to 15 feet deep. The depth of the lake varies from 0 to 40 feet. Below Rabbit Lake is Clinker Lake, which has an area of 96 acres and a depth of from 0 to 35 feet. Between Rabbit and Clinker is a channel or stream about 500 feet long. Below Clinker is Curley or Turner Lake. We shall refer to it hereafter as Turner Lake. It has an area of 64 acres and a depth of from 0 to 36 feet. Between Clinker and Turner is a connecting stream about one-half mile long. Below Turner lies Mahnomen Lake, the next largest lake, with an area of about 400 acres and from 0 to 25 feet deep. Between Turner and Mahnomen is a stream also about half a mile in length. Below Mahnomen is Pascoe Lake, with an area of 64 acres and from 0 to 15 feet deep. Between Mahnomen and Pascoe is a connecting stream about 800 feet in length. Below Pascoe is Little Rabbit Lake, with an area of 179 acres and a depth of from 0 to 30 feet. Between Pascoe and Little Rabbit is a connecting stream about 1.7 miles in length. At the lower end of Little Rabbit is an outlet stream, about 800 feet in length, which empties into the Mississippi River. The stream connections are called Rabbit River.

Besides the lakes and streams in the above chain, there are several lakes and streams that enter into the picture. Again, commencing at the upper end, we find a small lake, called Carlson Lake, which lies a short distance east of Rabbit Lake. A small stream flows from Carlson into Rabbit, the

highest recorded flow being 82 gallons a minute. Just below Rabbit, directly east of Clinker and about the same distance from Rabbit, is a small lake called Mud Lake. A small stream flows from it into Clinker. About 2 miles from Mahnomen and to the south and east, lies Serpent Lake, a fairly large lake. A stream flows from Serpent into the upper end of Mahnomen. Just southwest of Mahnomen lies Jeune Lake, a small lake, and directly southwest of Jeune is Portage Lake, also a small lake. Both are landlocked. To the south of Jeune and Portage are Blackhoof and Little Blackhoof Lakes, less than a mile away. A stream flows westerly from these lakes and empties into Little Rabbit Lake.

As the stream from Blackhoof enters Little Rabbit and the court found in favor of the state in holding Little Rabbit navigable, we shall not enter into a discussion as to the navigability of the Blackhoof chain or Little Rabbit.

THE DRIVING OF LOGS ON THE RABBIT RIVER WATERS.

The state claims that the waters of the Rabbit River chain were used to transport logs to the Mississippi River and that the logs were driven. It produced one witness who testified that he had actually seen this being done. Cornell Sogge, the witness, testified that in 1898, when he was 12 years of age, he had seen men poling logs through a dam a short distance below Pascoe. No other witness ever saw or heard of a log drive on these waters. On cross-examination, he said that he saw the men taking the logs out of Jeune Lake into Mahnomen and that they pulled them over a mining dump. He also said that he saw men shoving logs through a steel culvert. He also said that about the same times he and his brother went by boat from Mahnomen to Little Rabbit and

on the trip went through a mining company trestle and that they had no trouble coming back up as there were no rocks or rapids in the stream. The witness was thoroughly discredited. The first mine on the Cuyuna Range was started in 1911, and the only mine on Little Rabbit was opened in 1914. The undisputed testimony is that there were both boulders and rapids in the stream between Pascoe and Little Rabbit. Because of old age and illness, Sogge may be excused from testifying as he did, but being thus charitable to him adds no weight to his testimony. The state claims that Sogge's testimony above conclusively proves that logs were driven down the streams and that the court should have so found. From what has been recited, it does not seem possible that any court could give such testimony sufficient credence to base a finding on it to that effect.

LOGGING DAMS ON RABBIT RIVER

The state claims that four logging dams had existed on the stream between Rabbit and Little Rabbit. Roy C. Pascoe, a witness for the state, testified that he saw two logs lying parallel in the stream below Pascoe Lake and a nearby fill. He concluded that what he saw were the remains of a wing dam. Edward D. Rhodes, a witness for defendants, described the same two logs but saw no evidence of a wing dam. He said that the logs were a rough pair of logs, rough knots on them and "hadn't * * * been roughed off," extending out from under a road fill. The state also claims that the uncontradicted evidence should have compelled the court to find the existence of a logging dam about 200 feet above the entrance of Rabbit River into Little Rabbit. Witness Pascoe described what he claimed were the remains of a dam at

that point. He described them as logs set in the bed of the river at an angle and an old log across the bed of the river. From what he claimed he saw, he prepared a map and drawing of a complete dam. During cross-examination, a comparison of his map with the United States topographical map showed that a dam at that point would have had to be from 425 to 528 feet long to hold back the water because of a wide swamp along the river at that point. Another state's witness, B. F. Hartman, testified that, when he was 16 years old in 1897, he trapped along the river and saw a dam at the same place. Hartman said that it was a cutaway dam. He was asked:

"Q. Was there any side or any earth wings or dikes?

"A. Always a few splinters where it looked like they were blowed out. The dam lay in the bank—logs where the ends laid in the bank.

"Q. Did you see the logs in there?

"A. The pieces of them."

As stated before, at that point a dam over 400 feet long would be required to hold back the water. The state claims that the testimony of these two witnesses, as partially set out, conclusively proves the existence of a logging dam just above Little Rabbit. The court found otherwise and properly so.

The state also claims two dams between Turner and Clinker and bases its claim on the state's same witnesses Pascoe and Hartman. Pascoe said that in 1948 he found two old rotted logs about 800 to 1,200 feet below the state control dam, a so-called WPA dam. On cross-examination, he said that he was not so sure where he saw the logs and finally said:

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"Well, I am sorry if I gave the impression at that particular point there was a dam, I had not intended that. We simply found two logs at that location."

The state claims that the testimony of Pascoe established a dam at that location. Witness Hartman said that about 50 years ago there were two dams between Clinker and Turner, the one below Clinker being a gate dam. But all that was left of that dam was one log in the bottom of the river. As to the second dam, when asked what kind of a dam it was, he answered: "I don't recollect. That was pretty well rotted out, but big logs are across the creek yet * * *." He said that it was not a gate dam but a cutaway dam, and when asked to find the location of the dam he was unable to do so. The court properly refused to find two logging dams between Clinker and Turner.

Serpent Creek is not involved in these proceedings, except what bearing its existence might have upon the watercourse between the upper end of Mahnomen and Little Rabbit. The state claimed two dams on Serpent Creek. The court found that Serpent Creek was never used for driving logs even with artificial means. Without detailing the facts as we have done in connection with the claimed dams on Rabbit River, it is sufficient to say that the court, on the evidence, could very well find that no logging dams existed on Serpent Creek.

The court found that a dam existed at a point where the road now crosses the stream between Pascoe and Little Rabbit. It found that the dam was probably used to drive logs out of Little Rabbit into the Mississippi River. In 1888, a power dam was built across the Mississippi at Brainerd, about 9 miles downstream from Rabbit River. At the mouth

of Rabbit River, the waters of the Mississippi were raised by this dam about 7 feet according to the testimony of defendants' expert witness and 4 to 5 feet according to the state's expert. The government survey of 1869 shows a swamp, what is now an arm of Little Rabbit, with 5 to 8 feet of water. In the area of dead trees, there are depths up to 7 and 8 feet. In the spring of 1950, when the water in the river was the highest ever known, a part of the Brainerd dam went out. A witness testified that at that time he canoed through the channel into Little Rabbit. The channel was only 6 to 8 feet wide, and his paddle touched bottom. Another witness, who drove the Mississippi before the Brainerd dam was built, said that the entrance to Little Rabbit at that time was "kind of a small creek * * * growed up with grass and weeds" and that there was not enough water to drive the logs out. The field notes of the government surveyor showed that on March 3, 1870, the width of the river where it flowed into the Mississippi was .9 chains or 59.4 feet. As the natural flow of the river was small, it is evident that, when spread over a width of about 60 feet, it must have been very shallow. That the dam in question below Pascoe was built to create a head of water to drive logs out of Little Rabbit into the Mississippi seems very probable, and the evidence supports the finding of the court to that effect

LOGGING OPERATIONS ON THE RESERVATION

In 1857, the Indians of the Rabbit Lake Reservation, within which the Rabbit River basin was located, entered into a timber contract with one Morrison, giving him the right for a period of 10 years to cut logs on the reservation. This contract was not approved by the government, but,

under some other arrangement, Morrison was permitted to cut timber and did so several seasons, the first one being 1857-1858 and the last one 1863-1864. Altogether he cut over 26,000,000 feet of white and red pine. The logs were floated down the Mississippi to St. Anthony, now Minneapolis. In his operations, Morrison used horses and oxen, having, according to a statement made by the Indians, 20 horses the first winter, that of 1857-1858. They also stated that in the winter of 1861-1862 he had four pair of horses "at our camp," which undoubtedly referred to the Morrison camp, near the Indian village. How many horses were used during the other seasons is not disclosed.

The field notes of the government surveyors made in 1868 to 1871 refer to "remnants" of four logging operations. It is assumed that they represent the area of the lumbering done by Morrison. One of the areas was east of and near the Indian village and probably is the one the Indians referred to as "our camp," at which they said Morrison had four teams of horses stationed during the winter of 1861-1862. This logged area was between one and one-half and two miles from the Mississippi. As all of Morrison's logs were to be driven down the Mississippi to St. Anthony, it does not now seem reasonable to suppose that Morrison drove these logs down the whole length of the Rabbit chain of streams and lakes, with all the inconveniences connected therewith, if the small streams could be driven at all, when the Mississippi River, the ultimate goal, was so nearby and he had the horses and equipment with which to do the hauling. As this is the only logging operation that could possibly have used the claimed two dams between Clinker and Mahnomen, it is very strong proof of the nonexistence of these two dams. There were

also remains, according to the field notes, of old pine lumbering operations directly south of Mahnomen about two and one-half or three miles from Little Rabbit and three and one-half miles from the Mississippi at its nearest point. It is difficult to tell how extensive this logging area was, but it seems to be the smallest of the operations. This cutting, although it is the farthest distance of any of the four from the Mississippi or Little Rabbit, cannot be considered a long haul to either landing. A four- to eight-mile haul is not uncommon, according to the testimony. Furthermore, for most or practically all of the distance there would be a level haul over frozen lakes, Mahnomen and Pascoe, swamps, and the meadow along Rabbit River. It seems fair to assume that the logs from this cutting were hauled to one of the landings indicated, rather than being banked on Mahnomen and then driven through the river and Pascoe and the two claimed dams between Pascoe and Little Rabbit. This cutting is the only one that could possibly use these two dams, and, as it seems most improbable that the logs were routed that way, it argues the nonexistence of the dams. The field notes call attention to another cutting of heavy growth with a considerably larger area than the two already mentioned. The west end of this cutting was about half a mile from Little Rabbit. Morrison certainly would not drive the logs from this cutting down Rabbit River, and that he would bank these logs at any point except at Little Rabbit does not seem reasonable. The field notes also disclose remnants of old logging operations near the Mississippi and the angle area between that river and Little Rabbit. No one would claim that Morrison would have used any waters of the Rabbit

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River chain to float out these logs, unless it would have been Little Rabbit.

The state argues that the logs from the two areas first described were driven from Serpent Lake into Serpent Creek and through the two dams into Mahnomen and then down the rest of the Rabbit River chain through additional dams into Little Rabbit. In view of the short distances to the Mississippi and Little Rabbit and the statement made by the Indians that Morrison used 20 horses the first year he logged (1857-1858); that during the winter of 1861-1862 he had four teams at the camp near the Indian Village; and that he undoubtedly used horses the other logging seasons, it does not seem reasonable or practical that he used the Rabbit River chain.

In 1900, one Henry Shields contracted to cut timber on certain tracts of land on Pascoe near the outlet stream. He agreed to bank the logs on "Boar Rabbit Lake and drove into Mississippi." He was thus agreeing to cut logs farther away from Little Rabbit than were the two logging areas last described and to bank them on Little Rabbit, although he was going to log the very shores of the claimed waterway. One witness testified that the dam which he claimed was located below Pascoe was called Shields dam. Apparently Shields, in his logging operations, did not use a dam.

The state in its brief insists that four logging dams existed on Rabbit River and that the trial court disregarded conclusive testimony when it found otherwise. It says:

> "The evidence conclusively establishes the location of four old logging dams in Rabbit River. * * *."

Not only do we find insufficient evidence to support the state's claim of the existence of these dams, but we can find no rea-

son for their existence. It is interesting to note that when government surveyor Ingerson surveyed T. 47, R. 29, in 1871 he made this comment in his field notes:

> "There evidently has been a good deal of pine in this Township, of which some has been destroyed by fire and stolen and probably run down the Mississippi."

This is the township which included one of the areas logged by Morrison. Ingerson evidently did not know of the Morrison contract. This is the only reference to driving logs in the surveyor's notes and is significant. In neither the survey of Butler nor of Ingerson, the two government surveyors, do we find any reference in their field notes that they saw any remains of old logging dams, although three of the four claimed dams were within 500 feet of the section lines which these surveyors ran, according to state's exhibit 5-a. One of the claimed dams was very near the logging camp on Clinker, which was referred to in the field notes.

Physical Changes in Rabbit River Basin

The physical changes which have taken place in the Rabbit River basin during the past half a century make it difficult at the present time to determine the amount of water which the watercourse carried in its original and natural state. In 1911, the first mine was opened near Little Rabbit. Now 16 mines, most of them open pit, are or have been operated along the watercourse. Many of the mines pump water out of the pits into the stream. In 1943, the Youngstown Mines Corporation received a permit to build a dike across the channel between the two bowls of Rabbit and to dewater the east bowl by pumping the water into the west bowl. For at

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least five years it pumped at least 15,000 gallons per minute, which water of course had to be carried away by the Rabbit River channel. Then in 1937, the state built two dams, one near Clinker Lake to control the water of Rabbit and the other just below Pascoe to control the water of Mahnomen. All these changes contributed to variations in the water flow and to material alterations in the physical characteristics of the stream and riparian lands. Because of the dam, it is apparent that Mahnomen is higher now than it was at the time of the original survey.

Rabbit River Between Rabbit Lake and Mahnomen Nonnavigable

At the present time, the only outlet of Rabbit is the so called "cutaway" which runs a distance of 500 feet southerly into Clinker. The court found that the cutaway was not a natural outlet but was manmade sometime after the original government survey in 1871. Rabbit Lake was meandered, and the subdivisions of the township within which it lies were surveyed in May and June 1871. At that time the surveyor noted no outlet of Rabbit in his field notes and the plat he made, although his field notes showed the small inlet from Carlson Lake, which inlet, however, was not noted on the plat. On the aerial map, the cutaway seems to be straight, even where it passes through a swamp. It has features of an artificial channel but also those of a natural one. Why it was dug, if dug, and by whom are unanswered questions. There is no evidence of any logging having been done in the vicinity of Rabbit Lake from 1871 to 1900, which would make an artificial channel either convenient or necessary.

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One expert was of the opinion that the channel was artificial and another that it was natural. Some witnesses testified that it was referred to as a cutaway and considered to have been cut by man. One witness testified that he had heard it considered both ways. As stated, the court found that the channel was manmade and therefore artificial; consequently, that Rabbit was a landlocked lake. Under the rule, there is probably sufficient evidence to sustain the finding. But whether the channel be held to be artificial or natural, such finding is of little materiality because of other facts and findings in the case.

The plats and field notes of the original government surveys were offered by the state and received in evidence. In 1868, one Butler surveyed the north line and the subdivisions of T. 46, R. 29. And in 1871, the subdivisions of T. 47, R. 29, were surveyed by one Ingerson. Neither surveyor noted in his field notes a stream entering Mahnomen Lake from the direction of Rabbit Lake. Nor do the plats made by these surveyors show such a stream. State's witness Alfred O. Anderson, a surveyor, testified that, on the basis of the original surveys, the headwater of Rabbit River was in Serpent Lake. When Butler meandered Mahnomen, he did not show any stream entering the lake where the stream in controversy now enters. In other words, he found no Rabbit River inlet to the lake. Nor is there any mention of an inlet in his field notes. He showed Serpent Creek, a small stream, entering from Serpent Lake to the south. Butler also ran the north line of T. 46, R. 29, in 1869. This is also the south line of T. 47, R. 29, the subdivisions of which were surveyed by Ingerson in 1871. Ingerson noted the stream which came out of Clinker Lake. Whenever and wherever he crossed it,

his field notes show it. He showed that the creek never entered Mahnomen but dissipated or disappeared in the large bog north of the lake. This bog is at least 1,000 feet wide at its widest point north of the township line and extends for a distance of three-quarters of a mile. The size of the bog below the township line is not shown. The termination of the stream coincides exactly with Butler's plat. That Ingerson was not unmindful of the stream is evidenced by the fact that whenever he crossed it below Turner Lake he made note of the fact in his field notes, and his plat shows its disappearance in the swamp at least 400 feet from Mahnomen.

When two official government surveyors, working separately two years apart, find the creek here involved did not in 1869 or 1871 enter Mahnomen Lake, it seems plain that there is sufficient evidence to sustain the finding of the court that the stream did not enter Mahnomen in 1858. The state adopts the only course which would seem to have any possibility of success in combating the fact of the nonexistence of the inlet stream to Mahnomen by attempting to prove inaccuracies in other respects of the surveys made by both surveyors. Many folios of record and brief are devoted to this endeavor. It would be unprofitable to detail all the evidence and arguments pro and con, but an examination of the record and exhibits in the light of the briefs and oral arguments convinces us that the surveyors did a creditable job, and, since it can be demonstrated that in other respects their surveys measure up in correctness with other early surveys, it does not seem possible or probable that both surveyors could be mistaken, either through negligence or fraudulent design, as to the existence of the so-called Rabbit River inlet to Mahnomen Lake. It is not a case of faulty

surveying in the use of angles and other measurements. It has nothing to do with their skill as surveyors. When they failed to note the claimed outlet from Rabbit and the inlet into Mahnomen, they in effect say that they did not see the claimed streams, and no reason suggests itself why they should not have seen them if they in fact existed at the time. They apparently noted all other streams, even the small rivulet from Carlson Lake to Rabbit. It is not noted on the plat, probably because of its insignificance. Either the outlet or the inlet did not exist or they failed for some reason, not understandable, to record what they saw. The court was fully justified in finding as it did on this feature of the case. A contrary finding on such evidence would be difficult to sustain, unless the court should say that both surveyors were unobserving or dishonest, and there are no indications in the record that such was the case.

Ingerson also meandered Rabbit and noted no outlet in his field notes or plat. The state also attempts to discredit this survey. Because of the fact that the court was fully justified in finding no Rabbit River inlet to Mahnomen in 1858, no navigable stream existed between Rabbit and Mahnomen, and whether the cutaway between Rabbit and Clinker was artificial or natural becomes immaterial. Certainly, the stream which became lost in the big swamp before it reached Mahnomen could not possibly be a navigable stream under the Federal test or any other rule.

Rabbit River Between Mahnomen and Little Rabbit Nonnavigable

We have determined that on the evidence the court did not err in finding the stream between Rabbit and Mahnomen

nonnavigable, among other reasons, because of the fact that it was only a watery cul-de-sac and led nowhere. We will now consider the evidence relating to the stream between Mahnomen and Little Rabbit. At all times in its natural and original state, Rabbit River could have been nothing more than a very small stream. We can recall no case where a stream so small has been held to be navigable. In 1942, according to state's exhibit 97, at a point half a mile below Clinker, the stream was 4 feet wide and 1.1 feet deep, and about 300 or 400 feet farther on it was 13 feet wide and .8 foot deep. Two witnesses said that they had jumped or stepped across the stream at that point. Exhibit 97 shows that just above the dam below Pascoe it was about 50 feet wide and 5 feet or more deep, practically an extension of the lake. It had no visible current, with a wet bog on one side and a floating bog on the other. But, for a mile below the dam, it averaged 20.4 feet wide and 1.06 feet deep. The shallowest place was six-tenths of a foot deep, and the deepest spot 1.5 feet. The flow was 10,000 gallons per minute. Of this amount, five-sixths or 8,400 gallons were being pumped into the stream from nearby mines. The remaining 1,600 gallons per minute may be considered the natural and normal flow. To a layman, the most understandable evidence as to the size of the stream below Mahnomen is that, up to the time of the dewatering of the east bowl of Rabbit, it passed under the road just below Pascoe through two 18-inch culverts. There is no evidence that these culverts were insufficient to take care of all the water that came down the watercourse during spring thaws and freshets. Not only that, there is no evidence that they were not able also to take care of the additional 8,400 gallons per minute pumped into

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Mahnomen from six adjacent mines. These small culverts are compelling evidence of the small size of Rabbit River in its original and natural state.

No navigability is claimed for the stream except for the transportation of logs. In the distance between Pascoe and Little Rabbit, the stream curves and meanders between high banks, the curves being so severe that in places the stream nearly runs back upon itself. The size of the stream and its meanders are such that it may not be possible or practicable to drive logs, the only claim of navigability for the stream, even with artificial structures such as dams. In view of the nearness of Mahnomen to Little Rabbit, no one, it would seem, would go to the expense of building dams and to the trouble of transporting the logs through sluiceways down a small tortuous shallow creek when a short haul is available. The Shields contract of 1900 demonstrates that fact. The court found that, because of the small flow and other characteristics, the stream as a whole was not navigable and was not susceptible of being used as a highway of commerce.

In United States v. Appalachian Power Co. 311 U. S. 377, 406, 61 S. Ct. 291, 298, 85 L. ed. 243, 252, the court said:

> "Both lower courts based their investigation primarily upon the generally accepted definition of *The Daniel Ball*. In so doing they were in accord with the rulings of this Court on the basic concept of navigability. Each application of this test, however, is apt to uncover variations and refinements which require further elaboration."

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The Daniel Ball definition, 77 U. S. (10 Wall.) 557, 563, 19 L. ed. 999, 1001, has been quoted in practically all the cases. It reads:

> "* * * Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

The court in the Appalachian Power Company case continues (311 U. S. 407, 61 S. Ct. 299, 85 L. ed. 252):

> "To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. 'Natural and ordinary condition' refers to volume of water, the gradients and the regularity of the flow. A waterway, *otherwise suitable for navigation*, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. * * * The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful." (Italics supplied.)

If the court had found in this case that the stream, although insufficient to transport logs in its original and natural state, still with the use of artificial aids it would be navigable, under the Appalachian Power Company case, as we understand it, that would not be sufficient to prove

navigability. Unlimited artificial aid is not countenanced under the rule in that case. There is a limit beyond which the improvement of the stream may not go, "obviously" so, the court states, as (311 U. S. 407, 61 S. Ct. 299, 85 L. ed. 253) "There must be a balance between cost and need at a time when the improvement would be useful." Applying that rule here, it is apparent that any investment in dams would be at an excessive cost in comparison with the need. The need for transporting logs from the area near Mahnomen to Little Rabbit is nil, even if logging days would return, because of the nearness to the landings at Little Rabbit and the Mississippi. The Shields contract of 1900 illustrates this. Any cost or expense in constructing dams clearly would outweigh the need. What is said here would apply equally to the stretch of waterway between Rabbit and Mahnomen, if such waterway had been found to exist.

In Wagner v. City of Baltimore, 210 Md. 615, 625, 124 A. (2d) 815, 820, the court, in commenting on the statement in the Appalachian Power Company case relative to the balance between cost and need, said:

> "* * * The rule now recognized by the Supreme Court goes beyond the former rule in that waters which, though not navigable in fact in their natural state, may be made navigable in fact without undue cost, are navigable waters."

Historical Evidence

Historical evidence may be important in determining navigability of waters. If such evidence shows actual navigation in any manner, then navigability is established. In this case, there is no historical evidence sufficient to show navigation or navigability of the waters here involved. In

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1836, one Nicollet made a journey covering a large part of what is now northern Minnesota and Wisconsin. He produced a map showing the geographical data which he claims he found. The state claims that the map shows water routes across and through waters here involved and that, upon the basis of the map, the court should have found the waters navigable. Certain dotted lines are found running easterly overland to other lakes and finally overland to Mille Lacs. This, the state's expert historical witness explained, was not a water route but an overland one. Furthermore, it did not follow the Rabbit River chain and can therefore have no bearing on the navigability of these waters. The early logging operations and Indian travel are being treated elsewhere.

The Claimed Trading Post

Certain articles consisting of bones, a fork, at least a dozen damaged clay pipes such as were usually used in Indian trade, and other small items were found some years ago near what appeared to be a small stone wall of clay masonry. The state insists that this evidence conclusively proves the existence of a trading post and attacks the court's finding that there was not sufficient proof of a trading post at that point. The articles were found a short distance west of the rapids between Pascoe and Little Rabbit. The evidence certainly does not conclusively show that a trading post existed, and the court could very well find that one did not exist. Why a trading post should be located at that point is difficult to understand. If the evidence had been sufficient and the court had found its existence, that fact would have little or no bearing on the question of navigability of Rabbit River, as the point where the claimed trading post was lo-

cated was some distance from the stream, which at that place was not navigable by canoe or boat because of the rapids and boulders. The location was but a comparatively short distance from Little Rabbit and the Mississippi; a little better than a mile from Little Rabbit and two miles from the Mississippi. The Indians used the portage trail on the east side of the stream. The existence of the claimed trading post, if it did exist, would add no proof to the question of navigability of Rabbit River.

RABBIT LAKE INDIAN RESERVATION

In 1855, the Rabbit Lake Indian Reservation was established. In 1865, the reservation was abolished and the land ceded back to the government of the United States. The Mississippi River was the north and west boundary of the reservation. When, in 1858, Minnesota was admitted to the Union, the Rabbit River basin was within an Indian reservation. The Constitution of the United States grants to Congress the power to regulate commerce with the Indian tribes. The argument of the state seems to be that, since Indians lived on the reservation, their comings and goings constituted commerce and the waters within the reservation were therefore navigable waters, or that the fact alone that these waters lay within an Indian reservation was sufficient to make them navigable waters of the United States. The fact that the waters here involved were within the Rabbit Lake Indian Reservation can have no bearing on the question whether such waters were navigable under the Federal rule or any other rule. Whatever travel there was by the Indians, within the reservation or outside of it, did not constitute commerce according to the evidence in the case. The evi-

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dence shows that there was an Indian village with a population of about 160 adults located at the south end of Rabbit, between Rabbit and Clinker. There was an Indian trail from the Mississippi to the north end of the west bowl of Rabbit, 1,000 feet away. Presumably the Indians canoed between the trail and the village. From Little Rabbit an Indian trail extended to Mahnomen, with water crossings over Jeune and Portage. Toward the east from Rabbit was an Indian trail which extended as far as Mille Lacs, with several lake crossings. These are the only Indian trails within the reservation as far as any maps show. There is no evidence that the Indians traveled the length of the Rabbit River chain or had a canoe route in that area, and if they did not use it as a route for travel at all, they of course could not have engaged in commerce over the route. The question here involved is the existence of commerce over these waters and their suitability for commerce. The state claims that there is no evidence to support the finding of the court that the Indian travel was not water travel and that it did not constitute commerce. There is no evidence that the Indians carried any articles of commerce over these waters.

In State, by Burnquist, v. Bollenbach, 241 Minn. 103, 63 N. W. (2d) 278, the evidence showed more extensive Indian travel and activities over Five Lake, the water there involved, than over the Rabbit River chain, and we held that such activities of the Indians or the evidence disclosed provided no basis for finding that a body of water is navigable under the Federal test.

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State's Expert Testimony

The state, in its attempt to show that the amount of water that would or did flow through the Rabbit River waterway was sufficient to make it a navigable stream, called an expert witness, Mr. Frellsen. He based all his calculations on a 1,200-foot elevation of Rabbit, which elevation was reached only once within the memory of living men, and that was in 1950, when natural water levels were the highest known. In addition, at that time 16,000 gallons per minute were being pumped into the west bowl of Rabbit from the east bowl. It must be obvious that calculations based on an assumed elevation of 1,200 feet, with the additional artificial flow of 16,000 gallons per minute, and without taking into consideration the influence of the control dams, can have little or no value in determining the flow of water in Rabbit River under normal and natural conditions. The elevation of Rabbit for 13 yearly readings within the period of 1914 to 1942 showed an average elevation of 1197.8, the lowest being 1196.6. State's expert, Mr. Meyer, also made calculations based on a Rabbit elevation of 1198.5, again considerably below the average. Using such elevations as their basis, these experts were of the opinion that sufficient water flowed through the channel in its normal and natural state for the floating of logs, the only use claimed for the waterway. It is plain that the court was not bound by the opinions of the experts based on such calculations founded on such high elevations. Furthermore, since the testimony shows no channel existed through to Mahnomen from Rabbit at the time the state was admitted to the Union, the expert calculations and opinions are of little or no value in determining the navigability of the stream.

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Rabbit Lake

6. Rabbit Lake, before dewatering, had a water area of 1,160 acres and up to 40 feet in depth. It consisted of two so-called bowls of about equal size, with a channel about 15 feet deep and 700 feet wide connecting them. Each bowl is about a mile across. A small creek coming out of Carlson Lake, with a maximum flow of 82 gallons a minute, flows into the lake at the north end. It has no other inlet. In the south end is the so-called cutaway, already described. Whether the cutaway was natural or artificial, the watercourse disappeared in a large swamp north of Mahnomen, so whatever outlet Rabbit had ended in the swamp. The court found that Rabbit was not navigable by itself or in connection with any other waters. The lake was never used in connection with floating or driving of logs or transportation of any articles in commerce. There is no evidence that any logging was done near the shore of the lake, except that in 1906 one Larsen contracted to cut the white and Norway pine on certain tracts of land lying adjacent to the lake and to bank the logs on the Mississippi River. The field notes of the government surveyor, who subdivided the fractional township in which the greater part of Rabbit is located, found considerable hardwood timber, aspen, tamarack, and some pine and much burned-over territory. He notes: "there are many wide stretches almost destitute of timber and many windfalls caused by fire." Indians had a village south of the lake. There was also a trail which led east from Rabbit. There is no evidence that the Indians used the Rabbit River waterway except as stated. There is no evidence that the Indians engaged in any commercial activities on Rabbit,

and the same is true of the white settlers. The lake has been used for recreation, such as boating, swimming, and fishing, and three resorts engaged in the business of renting out cabins and furnishing boats and other recreational equipment were located on the lake. The court found that Rabbit was not navigable by itself or in connection with any other waters, and the evidence sustains the finding.

7. The navigability of a lake was recently considered by this court in State, by Burnquist, v. Bollenbach, 241 Minn. 103, 63 N. W. (2d) 278. The lake there in question was Five Lake, a meandered lake of about 200 acres, up to 40 feet in depth, and about a mile long and of a maximum width of about half a mile. Five Lake has no inlet or outlet. It has never been used for logging purposes. The trial court found that Five Lake was nonnavigable in 1858, the year Minnesota became a state; that it was not used as a highway for commerce or travel; and that it had never been used for purposes of commerce or travel since the admission of the state to the Union nor has it at any time been capable or susceptible of such use. We held that, although Five Lake has not been used as a highway for useful commerce, it could still be deemed navigable in 1858 if at that time it was in its natural and ordinary condition susceptible to such use. The court said (241 Minn. 120, 63 N. W. [2d] 289):

> "* * * The susceptibility of a body of water for use as a highway for useful commerce is determined mainly by two factors: (1) Whether the body of water has physical characteristics which permit and are conducive to water travel; and (2) whether the body of water is situated in a location useful to commercial trade and travel."

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As to physical characteristics, Rabbit has sufficient area and depth to comply with the first factor. So did Five Lake. But the location of Rabbit is such that it is difficult to see how it can be useful to commerce. It is not quite as landlocked a lake as Five Lake, but the nature of its outlet is such that, from a practical point of view, there is very little difference. The deadend watercourse had no commercial potentialities. Except as to size, there is very little difference in characteristics between Five Lake and Rabbit. Lakes may be smaller than either Five Lake or Rabbit and still, because of their locations, may be useful for commerce. The usefulness for commercial activities depends on the characteristics of each individual lake, and one cannot say arbitrarily that a lake of so many acres is navigable but that any lake of less acreage is nonnavigable. Navigability of a lake is a fact question, and other factors in addition to its size much be considered. The significant and all-important thread which runs through all the cases dealing with the navigability of a stream or lake is that of commerce, either actual commerce or suitability and susceptibility for use in commerce. The commerce may be large or small, depending on the area furnishing it, but still it must be commerce. A landlocked lake, if sufficiently large to furnish a route of useful commerce within itself between places which have a need, actual or potential, for such route of commerce, of course comes within the Federal test. Also, a small lake may be navigable if so located as to provide a commercial route. The physical capabilities of a lake, together with its location and all surrounding circumstances, determine its navigability. Thus, it will be seen, each lake must be treated as an individual body of water.

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In Leovy v. United States, 177 U. S. 621, 632, 20 S. Ct. 797, 801, 44 L. ed. 914, 919, in dealing with the question of navigability of waters of the United States, the court said:

> "It is a safe inference from these and other cases to the same effect which might be cited, that the term 'Navigable waters of the United States,' has reference to commerce of a substantial and permanent character to be conducted thereon."

Of course, our situation does not involve "Navigable waters of the United States," as that term is used and understood, but the idea of navigability includes that of commerce. What has been said of Rabbit applies to Clinker, Turner, Mahnomen, and Pascoe. They are smaller lakes and not situated in locations useful for commerce. They have not been used for commerce and do not provide practical routes for commerce, and no lake connects points between which they would be useful as a practical route for navigation.

Navigability of lakes has been considered in the cases listed in footnote and the lakes involved found nonnavigable.[1]

[1] United States v. Ladley (D. Idaho) 42 F. (2d) 474; Hodges v. Williams, 95 N. C. 331, 59 Am. R. 242; Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686; Cobb v. Davenport, 32 N. J. L. 369; Monroe v. State, 111 Utah 1, 175 P. (2d) 759; McGahhey v. McCollum, 207 Ark. 180, 179 S. W. (2d) 661; Bernot v. Morrison, 81 Wash. 538, 143 P. 104; Snively v. State, 167 Wash. 385, 9 P. (2d) 773; Smith v. State, 184 Wash. 58, 50 P. (2d) 32; Lefevre v. Washington Monument & Cut Stone Co. 195 Wash. 537, 81 P. (2d) 819; State v. Sweet Lake Land & Oil Co. 164 La. 240, 113 So. 833; Hardin v. Jordan, 140 U. S. 371, 11 S. Ct. 808, 35 L. ed. 428; United States v. Oregon, 295 U. S. 1, 55 S. Ct. 610, 79 L. ed. 1267; Harrison v. Fite (8 Cir.) 148 F. 781; Toledo Liberal Shooting Co. v. Erie Shooting Club (6 Cir.) 90 F. 680; North American Dredging Co. v. Mintzer (9 Cir.) 245 F. 297; State v. Brace, 76 N. D. 314, 36 N. W. (2d) 330.

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Rabbit was never used as a highway of commerce because it afforded no highway or avenue of practical importance for commerce. While the lake is large enough to float a good-sized boat, it is not wide enough or long enough to provide a practical route for the transportation of commodities or passengers in any direction. The beginning and the end of the highway must be such that useful commerce would naturally go between them.

In United States v. Holt State Bank, 270 U. S. 49, 46 S. Ct. 197, 70 L. ed. 465, Mud Lake in Minnesota was held navigable. It was eight miles long and of sufficient depth. It actually was used by the early settlers and merchants for the transportation of supplies and merchandise. It had a location which made it useful for commerce.

In State v. Longyear Holding Co. 224 Minn. 451, 29 N. W. (2d) 657, Syracuse Lake, with an area of only 33 acres, was involved. The court held it navigable. Not only did it have a location which made it useful for commerce, but it had actually been used for commerce. For many years prior to Minnesota's admission to statehood it was part of a commercial route used by Indian trappers and by individual fur traders, as well as agents of the Northwest Fur Company and American Fur Company. It had also been used by timber and lumber interests for moving down forest products and floating down logs.

In Taylor Fishing Club v. Hammett (Tex. Civ. App.) 88 S. W. (2d) 127, 129, the court said:

> "* * * Every inland lake or pond that has the capacity to float a boat is not necessarily navigable. It must be of such size and so situated as to be generally and commonly useful as a highway for transportation

of goods or passengers between the points connected thereby. It must either alone or in connection with other bodies of water connect points between which it is practical to transport commerce by water."

These cases illustrate the importance of the existence of commerce or susceptibility for commerce in the determination of navigability of lakes. Susceptibility of availability, of course, depends chiefly on their location.

PRIOR PROCEEDINGS

8. The state claims that the defendants here are estopped to claim and prove Rabbit and the cutaway were not navigable under the Federal rule. In 1943, in proceedings following its application for permit to dewater the east bowl of Rabbit, Youngstown Mines Corporation submitted a certain map (exhibit 97) showing the Rabbit River watercourse, and the state bases its claim of estoppel on certain data found on that map. If an estoppel has been created against Youngstown, and we are not considering that question, it could affect only Youngstown and no other party or parties. Youngstown cannot be affected by the result in these cases, since it holds a mining lease from the State of Minnesota covering the iron ore in the bed of the lake and also holds mining leases and numerous easements for drainage from the riparian owners. It is not disputing the state's title in common with the riparian owners, and its claim of neutrality in this controversy is substantiated.

The state also claims that, under the decision of this court in Petraborg v. Zontelli, 217 Minn. 536, 15 N. W. (2d) 174, the question of navigability and naturalness of the cut-

away from Rabbit to Clinker is res adjudicata against the defendants in these actions. The Petraborg case involved an action to enjoin the Youngstown Mines Corporation from dewatering the east bowl of Rabbit and constructing a dike across the narrows. The state was not a party. Navigability of the lake under the Federal test was not involved. It was simply an action by riparian owners to enjoin the draining of the lake without their consent. The decision was based exclusively upon the ground that riparian owners had the right to the maintenance of the waters in their natural condition. That right must exist whether a body of water be navigable or nonnavigable. The title to lake or stream beds was not involved. Most of the defendants in the instant cases were neither parties nor privies of the parties in the Petraborg case. The judgment in that case certainly cannot be res adjudicata as to them. The ownership of beds of streams and lakes is quite a different matter from the right to control waters.

As we find no errors that require a reversal, the orders of the trial court appealed from are affirmed.

Affirmed.

C. R. MAGNEY

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OPINION OF SUPREME COURT UPON REHEARING

No. 53
Crow Wing County
Thomas Gallagher, J.

Endorsed
Filed March 14, 1958
Mae Sherman, Clerk
Minnesota Supreme Court

STATE OF MINNESOTA,

Appellant,

36844–5–6–7–8–9 vs.

ROBERT MORFORD ADAMS, ET AL. (36844);
THE ADAMS CORPORATION, ET AL. (36845);
ADAMS HOLDING COMPANY, ET AL. (36846);
BYRON H. COOLIDGE, ET AL. (36847);
THE ADAMS CORPORATION, ET AL. (36848);
ROBERT M. ADAMS, ET AL. (36849);

Respondents.

UPON PETITION FOR REHEARING[1]

THOMAS GALLAGHER, Justice.

These actions were instituted by the state to have determined that it is the owner of certain lake beds within the

[1]Commissioner C. R. Magney who wrote the original opinion

state under which lie valuable deposits of iron ore. The prayer for relief in the various complaints therein is as follows:

> "WHEREFORE plaintiff prays judgment that it is the owner in fee simple of such lands constituting the lake bed of * * * [name of] Lake and the river bed of the stream connecting * * * [name of] Lake and * * * [name of] Lake * * * as aforesaid, and the sole owner of all iron ores and other minerals on, in, or under said lands, together with the exclusive right to enter on said lands and explore for and remove such iron ore and other minerals, together with the right to regulate, control, and divert the waters of * * * [name of] Lake, and that the defendants and none of them have any estate or interest in or lien upon said lands, or the iron ores or minerals thereon, or thereunder, and for its costs and disbursements herein."

Defendants are the owners of the shores bordering on the lakes described in the various actions and are legally designated "riparian owners,"[2] or "riparian proprietors."

Contrary to the claim of the attorney general stated in his petition for reargument, this litigation is not a contest between certain mining companies and the school children of the state. It is concerned solely with the ownership of certain lake property as between the state and the riparian owners thereof, most of whom are private citizens. As such, it is governed by legal principles and applicable laws to the same extent as it would be if it concerned any two individuals. Under our constitutional form of government, *this court cannot by judicial fiat delegate to the state a power*

[2]See, 56 Am. Jur., Waters, § 273.

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to deprive its citizens of their property without just compensation therefor, regardless of whether such property be in the form of minerals, dwellings, farms, or industries. When we divorce ourselves from any desire to give these lake beds to the state simply because they contain valuable iron-ore deposits, and apply the legal principles applicable in litigation between private citizens under our constitution and laws, the issues become clearly defined and readily determinable.

It is well settled that, in any case which has been decided here, a rehearing is not authorized merely to permit the losing party an opportunity to again present arguments which have already been considered by the court in arriving at its decision. Before a rehearing may be granted, there must be a showing that this court has overlooked some *material* fact or some *controlling* principle of law. Unless there is such a showing, the decision should stand.[3]

It is also elementary that on appeal *a case must be determined on the theory upon which it was tried.*[4] As stated in Northland Pine Co. v. Melin Bros. Inc. 142 Minn. 233, 235, 171 N. W. 808:

> "A party to an action cannot in the trial court adopt a theory of the cause of action, or of the relative rights

[3]Standard Clothing Co. v. Wolf, 219 Minn. 128, 17 N. W. (2d) 329; Derby v. Gallup, 5 Minn. 85 (119); 1 Dunnell, Dig. (3 ed.) § 469.

[4]We are not concerned with an exception to this general rule which permits us to consider a question raised here for the first time if such question is plainly decisive of the whole controversy on the merits, as where it conclusively appears on the record that there is no cause of action or defense. Cf. Chicago, M. & St. P. Ry. Co. v. Sprague, 140 Minn. 1, 167 N. W. 424; Skolnick v. Gruesner, 196 Minn. 318, 265 N. W. 44; Hart v. Bell, 222 Minn. 69, 23 N. W. (2d) 375, 24 N. W. (2d) 41; Ray v. Homewood Hospital, Inc. 223 Minn. 440, 27 N. W. (2d) 409.

> of himself and other parties, and obtain findings and judgment in accordance therewith, or invite error in the proceedings, and on appeal complain of the judgment which he sought or of errors which he helped make. Of the correctness of this general doctrine there is no question."

See, also, Edelstein v. Duluth, M. & I. R. Ry. Co. 225 Minn. 508, 516, 31 N. W. (2d) 465, 470.

The rule is likewise well established that a trial court's finding on a question of fact must be sustained on appeal if there is substantial evidence to support it.[5] The sole issue presented for determination at the trial was whether the described lakes or any of them were navigable under applicable Federal tests when Minnesota entered the Union. Had such navigability been established, then the beds under such lakes, including iron-ore deposits therein, would belong to the state rather than to riparian owners. Both parties submitted evidence on this issue. The trial court found that such evidence was insufficient to establish that the lakes, with the exception of Little Rabbit Lake, were navigable under the Federal tests at the time Minnesota was admitted to the Union.

Accordingly, upon this appeal the only question presented for determination was whether the evidence submitted at the trial sustained the trial court's finding on the issue of navigability. Because of the importance of the question, this court granted the parties to the appeal unlimited time for oral argument and an entire day was consumed by them in presenting their respective contentions to this court. Thereafter, we made a careful and extended examination of the

[5] 1 Dunnell, Dig. (3 ed.) § 411.

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entire record consisting of over 2,000 pages in 5 volumes. Our examination disclosed substantial evidence to sustain the trial court's finding on the principal issue and hence under the rule above stated we were obligated to affirm it. As far as such evidence is concerned, the petition for rehearing presents nothing which was not submitted in the prior briefs and oral arguments of the parties or carefully considered by this court. It would follow that there is nothing to be gained by reargument of the fact question.

But as to applicable legal principles, the state now takes the position that the *Federal* tests for determining navigability of waters should *not* have been applied, but that some more liberal *state* rule should govern therein. Aside from the merits of this contention which will be considered later, the rule is well established that a party may not try his case under a legal theory chosen by him; and, being unsuccessful therein, subsequently complain upon appeal here that such chosen theory was really not the correct one after all. However, in view of public interest in this case and because of certain misleading impressions therein created through publicity releases emanating from the attorney general's office, we shall herewith consider and determine this present contention of the state notwithstanding that it is directly opposite to the position under which the case was tried and submitted by it.

Prior to Minnesota's admission to the Union, all lands lying east of the Mississippi River and northwest of the Ohio River, which include the lands involved in this litigation, were part of the Northwest Territory, *ceded to the United States* by Virginia on March 1, 1784.[6] Under the deed of

[6] See, Pollard's Lessee v. Hagan, 44 U. S. (3 How.) 212, 11 L. ed. 565.

cession, the *United States* held title to this territory in trust for the new states to be formed out of it. As such states were formed and admitted to the Union, they entered the Union on the same basis as did the original 13 colonies. This included the right of absolute ownership by such states of their respective navigable waters and soils thereunder.[7] As stated in Martin v. Waddell, 41 U. S. (16 Pet.) 367, 410, 10 L. ed. 997, 1013:

> "* * * when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution * * *."

That the title of Minnesota to its *navigable* waters and the soil beneath them rests upon such sovereignty at the time of its admission to the Union no one seems to doubt. The attorney general now argues, however, that each state, including Minnesota, may determine which waters were navigable at the time of its admission to the Union under its own laws as to navigability rather than under the Federal laws with respect thereto.

Until the decision of the Supreme Court of the United States in United States v. Holt State Bank, 270 U. S. 49, 46 S. Ct. 197, 70 L. ed. 465, it was not always clear what law governed the question of navigability.[8] That case arose in Minnesota. The issue therein was whether the bed of Mud Lake belonged to the riparian owners thereof or to the United

[7] Pollard's Lessee v. Hagan, 44 U. S. (3 How.) 212, 11 L. ed. 565; Martin v. Waddell, 41 U. S. (16 Pet.) 367, 10 L. ed. 997; Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331.

[8] See, for instance, Harrison v. Fite (8 Cir.) 148 F. 781.

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States, and determination of the issue was dependent upon whether Mud Lake was navigable at the time of Minnesota's admission to the Union. The trial court there found that under state law and tests as to navigability this lake had been navigable at such time. The circuit court of appeals affirmed this decision.[9] As to the applicable law in determining navigability, it stated (294 F. 166):

> "* * * in the determination of the rights of riparian owners to the lands under the water upon which their lands border, what shall be deemed a navigable water must be determined by the law of the state in which the riparian lands lie * * *." (Citing many of the cases now relied on by petitioner.)

This decision was affirmed by the Supreme Court of the United States.[10] However, in the decision by the latter, it was held that the trial court and circuit court of appeals had not applied the correct rule in determining navigability. With respect thereto, it was stated that (270 U. S. 55, 46 S. Ct. 199, 70 L. ed. 469):

> "Both courts below found that the lake was navigable. But they treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota. We think they applied a wrong standard. *Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.* * * * To treat the question as turning

[9] United States v. Holt State Bank (8 Cir.) 294 F. 161.

[10] United States v. Holt State Bank, 270 U. S. 49, 46 S. Ct. 197, 70 L. ed. 465.

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on the varying local rules would give the Constitution a diversified operation where uniformity was intended." (Italics supplied.)

In commenting on this decision after an exhaustive examination of the cases on the subject, Professor Edward S. Bade has said:

"* * * If any doubt remained that the United States Supreme Court had changed its views as to the law applicable to the determination of navigability vel non, United States v. Holt State Bank dispelled it."[11]

This position was reaffirmed by the United States Supreme Court in United States v. Utah, 283 U. S. 64, 51 S. Ct. 438, 75 L. ed. 844. This involved an action brought by the United States to quiet title to land constituting the bed of certain portions of the Colorado River and its tributaries. There the United States claimed that the waters were not navigable and that hence the state of Utah, upon becoming a member of the Union, did not acquire title to the beds thereunder. With respect to applicable law for determination of the question, the Supreme Court of the United States said (283 U. S. 75, 51 S. Ct. 440, 75 L. ed. 849):

"* * * The question of navigability is * * * determinative of the controversy, *and that is a federal question.* * * * *State laws cannot affect titles vested in the United States.*" (Italics supplied.)

In United States v. Oregon, 295 U. S. 1, 55 S. Ct. 610, 79 L. ed. 1267, the question involved in the present case was

[11] Bade, *Title, Points and Lines in Lakes and Streams*, 24 Minn. L. Rev. 305, 313.

again considered and determined. There the question was whether lands under certain shallow lakes were acquired by the state in its sovereign capacity or otherwise; or whether the United States retained title thereto. Determination of the question involved determination of the navigability of the waters. The court there stated (295 U. S. 6, 55 S. Ct. 612, 79 L. ed. 1270):

> "* * * If the waters were navigable in fact, title passed to the State upon her admission to the Union. * * * If the waters were nonnavigable, our decision must then turn on the question whether the title of the United States to the lands in question, or part of them, has passed to the State."

With respect to navigability, the court said (295 U. S. 14, 55 S. Ct. 645, 79 L. ed. 1274):

> "* * * if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new State. * * * *Since the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the State, under which the lands lie are navigable or non-navigable, is a federal, not a local one.* It is, therefore, to be determined according to the law and usages recognized and applied in the federal courts, even though, as in the present case, the waters are not capable of use for navigation in interstate or foreign commerce." (Italics supplied.)

With respect to the claims of Oregon that it was the owner of the title to the lake beds in consequence of grants of uplands by the United States, the court, after discussing some of the cases, commented as follows: (295 U. S. 27, 55

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some of the cases, commented as follows (295 U. S. 27, 55 S. Ct. 621, 79 L. ed. 1281):

> "*The laws of the United States alone control the disposition of title to its lands. The States are powerless to place any limitation or restriction on that control.* * * *
>
> "The State, in making its present contention, does not claim as a grantee designated or named in any grant of the United States. *It points to no rule ever recognized or declared by the courts of the State that a grant to individual upland proprietors impliedly grants to the State the adjacent land under water.* * * * The case is not one of the reasonable construction of grants of the United States, but the attempted forfeiture to the State by legislative fiat of lands which, so far as they have not passed to the individual upland proprietors, remain the property of the United States." (Italics supplied.)

These principles have been accepted by this court and by the attorney general as governing law since County of Becker v. Shevlin Land Co. 186 Minn. 401, 243 N. W. 433. That case involved the navigability of Otter Tail River. While the state was not a party to the litigation, the language of this court in affirming a finding that Otter Tail River was a navigable stream is significant. There we said (186 Minn. 403, 243 N. W. 434):

> "* * * As we read the record the court's finding is sustained, and the rule of navigability as announced in U. S. v. Holt State Bank, 270 U. S. 49, 46 S. Ct. 197, 70 L. ed. 465, is satisfied. * * * Lands underlying navigable waters become the property of the state upon its admission to the union unless in its sovereign capacity the United States has previously alienated them."

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In State v. Longyear Holding Co. 224 Minn. 451, 29 N. W. (2d) 657, 227 Minn. 255, 35 N. W. (2d) 291 (appeal dismissed, Longyear Holding Co. v. Minnesota, 336 U. S. 948, 69 S. Ct. 884, 93 L. ed. 1104),[12] at the trial the state prevailed on the issue of navigability. In holding that the evidence then submitted was sufficient to sustain the trial court's findings thereon, we stated (224 Minn. 456, 29 N. W. [2d] 661):

> "The only fact issue presented at the trial was whether Syracuse Lake was a navigable public lake *within the federal tests of navigability* at the time of Minnesota's admission to statehood, so that title to the bed thereof remained in the state upon such admission. * * *
>
> * * * * * *
>
> "It is well settled that the test of navigability to fix ownership of lake beds must be determined as of the date of a state's admission to the Union and under the federal decisions with reference thereto. [Citing cases.]" (Italics supplied.)

In the state's brief in the Longyear case, we find the following:

> "Only one issue of fact was presented to the Trial Court. The issue so presented was whether Syracuse Lake in St. Louis County was in fact a navigable public lake *within the federal tests* of navigability, which if met resulted in the passing of title to the bed of the lake to the State of Minnesota upon its admission to statehood.[13] * * *
>
> * * * * * *
>
> "Preliminary to a discussion of the evidence as to navigability, we submit a brief summary of the authori-

[12]See, 32 Minn. L. Rev. 484.

[13]See, respondent's brief, p. 2.

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ties as to the date as of which navigability shall be determined, the rule to be applied in determining navigability, and the tests of navigability under that rule.

"1. Navigability to fix ownership of lake bed and riparian rights should be determined as of the date of admission of Minnesota to the Union.

* * * * *

"2. *The question of navigability for the purpose of determining title to the bed of a lake is a federal question and should be determined under the federal rules as to navigability.*

"U. S. v. Utah and U. S. v. Holt State Bank, supra.

* * *

"3. The general test of navigability as laid down by the Supreme Court of the United States is stated in U. S. v. Holt State Bank supra, as follows: [thereafter follows the quotation from that case.]" (Italics supplied.)

In Bingenheimer v. Diamond Iron Min. Co. 237 Minn. 332, 54 N. W. (2d) 912, the state prevailed on the fact issue in the trial court. We reversed, holding that the evidence there was insufficient to sustain a finding of navigability under the Federal rule. As to the applicable law, we said (237 Minn. 342, 54 N. W. [2d] 918):

"Whether a body of water is navigable for the purpose of determining title is a federal question, and the federal, not the state, tests of navigability must be applied. [Citing cases.]

"States organized in the public domain, as was Minnesota, became vested upon admission to the Union with title to the beds of all waters then navigable and not previously granted by the United States, subject, of course, to the paramount power of the United States

over such waters by virtue of its power to regulate commerce."

In the brief of the state in the Bingenheimer case submitted by Victor J. Michaelson, special assistant to the attorney general, who presented the argument in the instant case, we find the following:

"*The question of navigability is a federal question and should be determined under the federal rule as to navigability.*

"U. S. v. Utah and U. S. v. Holt State Bank supra, and cases therein cited." (Italics supplied.)

Following these cases came State, by Burnquist, v. Bollenbach, 241 Minn. 103, 63 N. W. (2d) 278, 38 Minn. L. Rev. 685. While that case did not involve ore in the bed of the lake, the state did claim title to the lake bed on the theory that the lake was navigable when Minnesota became a state. There the trial court found that the lake was not navigable, and in affirming this conclusion, we said (241 Minn. 116, 63 N. W. [2d] 287):

"Navigability for purposes of determining title to water beds is a federal question controlled by the federal test of navigability. * * *

* * * * *

"* * * *it is now clearly the law that the determination of whether a water bed passed to a state upon its admission to the Union and the nature and extent of the title conveyed by the original patents from the United States to riparian landholders is a federal question* and not an issue to be resolved by local law." (Italics supplied.)

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On appeal in the Bollenbach case, the brief of the attorney general sets forth the following significant statement:

> "*A landmark in the law of navigation in Minnesota is U. S. v. Holt State Bank*, supra. Here the Court held Mud Lake to be navigable and established the test to be followed in determining whether a lake was navigable * * *." (Italics supplied.)

Finally, in the instant case as to the applicable rules of law in determining navigability, the attorney general in his original brief recognized and relied upon the Federal tests of navigability as formulated by the United States Supreme Court in the cases cited. Thus he there stated:

> "*The question of navigability for the purpose of determining title to the bed of a lake is a federal question and should be determined under the federal rules as to navigability.*" (Italics supplied.)

It is clear from the foregoing references and quotations that not until the present petition for rehearing was filed did the attorney general take any position other than that the Federal tests of navigability were applicable.

Students of law and authors of various articles and texts who have made a study of this subject have come to the same conclusion. A noteworthy article by Professor Edward S. Bade of the Law School of the University of Minnesota, 24 Minn. L. Rev. 305, 311, previously referred to herein, comments on the rule as follows:

> "* * * In the states formed out of the United States public domain, the United States originally had 'the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as

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they remained in a territorial condition and had power to make grants of this public domain, including lands under water, navigable or non-navigable, as it saw it. Its policy was not to convey away lands under navigable waters and it seldom did so. States organized in this public domain, upon admission to the Union, became vested with title to the beds of all waters then navigable if not previously granted by the United States, subject, however, to the paramount power of the United States over such waters in virtue of its power over interstate and foreign commerce, and perhaps its admiralty jurisdiction."

Professor Bade then discusses some of the cases and concludes that (24 Minn. L. Rev. 317):

"The United States retained the full proprietary powers over all parts of the public domain which did not pass to the state as before stated and which had not been previously disposed of.

* * * * *

"* * * If the beds of non-navigable waters do not pass with a grant of the adjacent upland, then they remain in the United States. The state cannot claim to become the owner of the beds of such non-navigable waters by virtue of grants of the abutting upland to individual patentees."

With respect to Hardin v. Jordan, 140 U. S. 371, 11 S. Ct. 808, 35 L. ed. 428, which is relied upon heavily by petitioner in support of its claim that the state law applies in determining navigability, Professor Bade had this to say (24 Minn. L. Rev. 318):

"In the light of the recent United States Supreme Court decisions heretofore mentioned, it would seem

that state courts generally have misapprehended the purport and effect of Hardin v. Jordan. First, they seem to have assumed that under that decision, the state test of navigability determined what waters were public waters, and consequently vested the state with title to the beds of all waters thus determined to be public. And second, the state courts seem to have regarded Hardin v. Jordan as laying down a rule of property instead of a rule of interpretation with reference to federal grants."

As a footnote, Professor Wade says (24 Minn. L. Rev. 318):

"Lamprey v. State (1893) 52 Minn. 181, 192, 53 N. W. 1139, 1140, 38 Am. St. Rep. 541, 18 L. R. A. 670 is a complete expression of this misconception. It runs through the Minnesota cases thenceforth. In fairness to the state courts let it be said that the federal courts, including the federal supreme court, entertained the same view."

In Patton, Titles, § 83, the authors in the original text issued in 1938 stated:

"Except as private rights have been acquired * * * it is a settled principle in the United States that the soil under navigable waters, *as defined by each separate state*, is in the sovereign." (Italics supplied.)

In the 1952 pocket part the authors felt compelled to qualify this statement as follows:

"'As *defined by each separate state*' appears to be entirely true in the case of original states only. States formed from federal territory acquired both their sovereignty and their land by grant. *In the case of waters and waterbeds which come to them as an incident of sovereignty, the test of navigability is that maintained*

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by the granting power and not some more liberal test formulated by their courts or legislatures." (Italics supplied.)

In 56 Am. Jur., Waters, § 461, after an exhaustive discussion of this entire subject,[14] the rule as to the applicable law is stated as follows:

> "The question whether waters within a state are navigable, so that title to the underlying lands may be considered to have passed from the United States to the state upon its admission to the Union, is a Federal question and not a local one, and is therefore to be determined according to the law and usages recognized and applied in the Federal courts, even though the waters are not capable of use for navigation in interstate or foreign commerce." (Citing United States v. Utah, *supra*; United States v. Oregon, *supra*.)

In Bulletin No. 4 of the division of waters, Minnesota Department of Conservation, issued February 1951, under the auspices of Chester S. Wilson, commissioner, and Sidney A. Frellsen, director of the division of waters, appears an article by Mr. Michaelson, assistant attorney general, wherein he comments on the question here presented as follows:

> "* * *. *The test of navigability of waters within the United States is to be determined by the federal rule* applied as of the time when a state was admitted to the union as a sovereign state. The federal rule has been repeatedly stated by the United States Supreme Court and followed and applied by the courts of the states. In United States v. Holt State Bank, 270 U. S. 56, 70 L. ed. 469, there was involved the question of

[14] See, § 451, et seq.

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navigability of Mud Lake situated in the state of Minnesota. * * *

* * * * *

"In Minnesota the determination as to whether a stream or lake is navigable must be determined under the federal rule, and as of the date when Minnesota was admitted to the Union, which is May 11, 1858." (Italics supplied.)

Based upon decisions cited, the conclusion is inescapable that what Minnesota owned in its sovereign capacity as a state upon admission to the Union and what was retained by the United States as part of the public domain clearly involves a Federal question. Whatever we may have assumed the law to be prior to United States v. Holt State Bank, *supra*, it is clear that since that decision the waters over which Minnesota may assert ownership as an incident of statehood due to their navigability must be determined under Federal law. We have followed that reasoning since County of Becker v. Shevlin Land Co. 186 Minn. 401, 243 N. W. 433, decided in 1932, and it is equally clear that the attorneys general of the state have been of the same opinion, at least since State v. Longyear Holding Co. *supra*.

We are not unmindful of the importance to the state of valuable ore deposits. However, we must also respect the rights of the citizens of this state who are riparian owners entitled to such ore unless the state can establish that the waters under which such ore is to be found were navigable under Federal tests at the time Minnesota was admitted to statehood. The laws of Minnesota are intended to protect the property rights of its citizens as well as to preserve the rights of the state. We are sworn to uphold and apply con-

stitutional provisions, recognizing the right of private ownership, and we would be guilty of abrogating our obligations as members of the judicial branch of this government were we to ignore such constitutional safeguards.

Inasmuch as this court correctly applied the tests for navigability formulated by the Federal courts *in the opinion previously filed herein*, there can be no reason for granting a rehearing on the issue of applicable law.

The state relies upon Petraborg v. Zontelli, 217 Minn. 536, 15 N. W. (2d) 174, in support of a claim that it has been determined that Rabbit Lake, one of the bodies of water involved in the present proceeding, has previously been held navigable contrary to the present decision. That case involved the right of defendant to drain one part of the lake for the purpose of removing iron ore thereunder. A riparian owner on that part of the lake not included in the drainage project brought the action seeking to restrain defendant. Therein both parties *conceded* that, for the purpose of such litigation, Rabbit Lake is a public body of water governed by laws applicable to public or navigable lakes and accordingly we were not required to pass upon the question. One comment therein, however, should be clarified. It is stated (217 Minn. 552, 15 N. W. [2d] 183) that:

> "* * * It is a well-settled policy of this state that 'meandered lakes belong to the state in its sovereign capacity in trust for the public.'"

Meandered lakes are not necessarily navigable lakes. Meandering a lake does not determine the question of its navi-

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gability.[15] Meander lines by government surveyors are mainly for the purpose of determining the quantity of land which is to be paid for by a prospective purchaser. The government surveyors had no power to determine navigability.[16]

The briefs amici curiae submitted in support of the petition for rehearing deal mainly with the importance of the lakes and streams to the people of the state from a recreational and tourist standpoint. We are not unmindful of this, but we are not dealing with the rights of the state to exercise control over its waters, nor is the question whether the Bollenbach case was decided on the correct theory before us. It was decided correctly upon the theory upon which the attorney general then chose to submit it. The question of public dedication was not submitted or determined herein. There will be time enough to decide the extent to which the state may exercise control over its waters which may be nonnavigable under Federal tests when a case involving this issue is presented.

Further, in the instant case the state is not seeking to protect its lakes and streams for recreational purposes or to encourage tourists. As a matter of fact, it is seeking the right to drain certain lakes, at least temporarily, in order to remove ore deposited beneath them. If it should be held that by some simple device or local test for determining navigability the state may claim title to lake beds regardless of whether such lakes were navigable under Federal tests

[15] County of Becker v. Shevlin Land Co. 186 Minn. 401, 243 N. W. 433; Bingenheimer v. Diamond Iron Min. Co. 237 Minn. 332, 54 N. W. (2d) 912.

[16] Oklahoma v. Texas, 258 U. S. 574, 42 S. Ct. 406, 66 L. ed. 771; Harrison v. Fite (8 Cir.) 148 F. 781; see, Schurmeier v. St. Paul & P. R. Co. 10 Minn. 59 (82).

at the time of the State's admission to the Union, then it would follow that the state could take unto itself the power to control, divert, drain, or otherwise exercise dominion over every stream, creek, or pond within the state without compensation and regardless of the loss to the riparian owners thereof.[17]

But the most direct and definite answer to the fears expressed in the briefs amici curiae with reference to the *recreational features* of our Minnesota lakes is that *the right of protection or control of the state waters for such or any like features has not been asserted by the state and is not involved in the present litigation in any way whatever.*

The petition for rehearing is denied.

THOMAS GALLAGHER

[17] As to the rights of riparian owners, see Lamprey v. State, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 A. S. R. 541; Shell v. Matteson, 81 Minn. 38, 83 N. W. 491; Hanson v. Rice, 88 Minn. 273, 92 N. W. 982; Tucker v. Mortenson, 126 Minn. 214, 148 N. W. 60; Schmidt v. Marschel, 211 Minn. 539, 2 N. W. (2d) 121, all of which in effect hold that the owners of land bordering on the shore of a meandered nonnavigable lake own the bed of the lake in severalty, the boundary lines of each abutting tract being fixed by extending from the meander line on each side of the tract lines converging to a point in the center of the lake.

APPENDIX A

(Title of Cause—Case No. 36844)

TRANSCRIPT OF JUDGMENT

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Crow Wing, be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondents herein, do have and recover of appellant herein the sum and amount of One Thousand Thirty-Three and 80/100 Dollars ($1033.80) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed April 23, 1958.

BY THE COURT

Attest:

Mae Sherman, Clerk

STATEMENT FOR JUDGMENT

Statutory Costs	$ 25.00
Printer	1008.80
Total	$1033.80

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(Title of Cause—Case No. 36845)

TRANSCRIPT OF JUDGMENT

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Crow Wing, be and the same hereby is in all things affirmed.

Dated and signed April 23, 1958.

BY THE COURT

Attest:

Mae Sherman, Clerk

APPENDIX B

RECORD IN TRIAL COURT

(Title of Cause)

RABBIT LAKE
Case No. 36844

COMPLAINT

Plaintiff for its cause of action alleges:

I

That Rabbit Lake is a meandered, navigable body of water situated in the County of Crow Wing, Minnesota, and bounded by the following government subdivisions or tracts of land, viz.: Lots Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), and Ten (10), of Section Nineteen (19), Township Forty-seven (47), Range Twenty-eight (28); Lots One (1), Two (2), Three (3), Four (4), and Five (5), of Section Twenty (20), Township Forty-seven (47), Range Twenty-eight (28); Lots One (1), Two (2), Three (3), Four (4), Five (5) and Six (6), of Section Twenty-nine (29), Township Forty-seven (47), Range Twenty-eight (28); Lots One (1), Two (2), Three (3), Four (4), and Five (5), of Section Thirty (30), Township Forty-seven (47), Range Twenty-eight (28); Lots Three (3), Four (4), Five (5), Six (6), and Seven (7), of Section Twenty-four (24), Township Forty-seven (47), Range Twenty-nine (29); and Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), and Eight (8), of Section Twenty-five (25),

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Township Forty-seven (47), Range Twenty-nine (29), which tracts of land were on May 11, 1858, ever since said time have been, and now are, riparian to said Rabbit Lake, and Lot Seven (7) of Section Twenty-nine (29), and Lot Six (6) of Section Thirty (30), Township Forty-seven (47), Range Twenty-eight (28), during all of said period of time were and now are islands within said Rabbit Lake, and that the outlet channel from said Rabbit Lake extending through Lots Six (6) and Seven (7), Section Twenty-five (25), Township Forty-seven (47), Range Twenty-nine (29), which empties into Clinker Lake, was during all of the time aforesaid a navigable river connecting said Rabbit Lake and Clinker Lake.

II.

That the defendant Youngstown Mines Corporation is a corporation organized and existing by virtue of the laws of the State of West Virginia and authorized to conduct its business in the State of Minnesota; and that the defendant Evergreen Mines Corporation is a corporation organized and existing by virtue of the laws of the State of Delaware and authorized to conduct its business in the State of Minnesota; that the defendant The Seven Counties Land Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Arketah Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Lake Investment Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Northern Trust Company is a corporation organized and existing by virtue of the laws of the State

of Illinois; that the defendant North Star Land Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant E. L. Trask Corporation is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Northwestern National Bank & Trust Company is a corporation organized and existing by virtue of the laws of the United States and authorized to conduct its business in the State of Minnesota; that the defendant Rabbit Lake Island Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant First Trust Company of Saint Paul is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Winston Bros. Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Cuyuna Mining and Investment Company is a corporation organized and existing by virtue of the laws of the State of Delaware and authorized to conduct its business in the State of Minnesota; that the Minneapolis, St. Paul & Sault Ste. Marie Railway Company is a corporation organized and existing by virtue of the laws of the State of Minnesota, Michigan and Wisconsin and authorized to conduct its business in the State of Minnesota; that the defendant Northern Minnesota Ore Company was a corporation organized and existing by virtue of the laws of the State of Minnesota, whose corporate existence expired by operation of law in 1929; that the defendant Northern Pacific Railway Company is a corporation organized and existing by virtue of the laws of the State of Wisconsin and authorized to conduct its business in the

APPENDIX B

State of Minnesota; that the defendant Northern National Bank of Duluth is a corporation organized and existing by virtue of the laws of the United States and authorized to transact its business within the State of Minnesota; that the defendant Hanna Coal & Ore Corporation is a corporation organized and existing by virtue of the laws of the State of Delaware and authorized to transact its business within the State of Minnesota, and is the successor in interest of the defendant, The Evergreen Mines Corporation; that the defendants Harris Trust and Savings Bank, Orelands Mining Company, Guaranty Trust Company of New York, a corporation, and the Onondaga Iron Company have not filed any articles of incorporation in the State of Minnesota, nor procured a license to transact business within the State of Minnesota as a foreign corporation and their legal status is to plaintiff unknown.

III

That plaintiff, upon admission to the United States as a sovereign state, became the owner of and ever since has been, and now is, the owner in fee simple of all that portion of the bed of Rabbit Lake below ordinary low-water mark, and the owner of that portion of the river bed connecting Rabbit and Clinker Lakes, lying and being below the ordinary low-water mark, and during all of the period of time aforesaid was and is the sole owner of all iron ores and other minerals on, in, or under said lands, together with the right to enter upon said lands and explore for, mine and remove such iron ore and other minerals and the right to sell, lease or otherwise dispose of such lands and such iron ores and

[illegible] control

and divert the waters covering said beds, subject only to the right, interest and estate of the Rogers-Brown Ore Company, whose corporate name has been changed to Youngstown Mines Corporation, under Lake Bed Mining Lease No. 2, entered into on the 4th day of June, 1924, by and between the State of Minnesota and said Rogers-Brown Ore Company, which lease is made a part hereof by reference, as fully as if set forth verbatim, and that the defendant Youngstown Mines Corporation is now possessed of all the rights and estate acquired by said Rogers-Brown Ore Company by virtue of the aforesaid lease.

IV

That the defendants and each of them claim estates or interests in or liens thereon adverse to the plaintiff.

Wherefore plaintiff prays judgment that it is the owner in fee simple of such lands constituting the lake bed of Rabbit Lake and the river bed of the river connecting Rabbit and Clinker Lakes, as aforesaid, and the sole owner of all the iron ores and other minerals on, in, or under said lands, together with the exclusive right to enter upon said lands and explore for and remove such iron ore and other minerals, together with the right to regulate, control, and divert the waters of Rabbit Lake, subject only to the lease owned and held by the defendant Youngstown Mines Corporation, and that defendants and none of them have any estate or interest in or lien upon said lands or the iron ores or other min-

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erals thereon, therein, or thereunder, and for its costs and disbursements herein.

Dated September 28, 1948.

J. A. A. BURNQUIST
Attorney General
VICTOR J. MICHAELSON
Special Assistant
Attorney General
G. L. WARE
Special Assistant
Attorney General
102 State Capitol
Saint Paul 1, Minnesota
Attorneys for Plaintiff

(Title of Cause)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

* * * * *

As Facts

I

That this action was brought by the State of Minnesota as plaintiff to quiet the title to all of the bed of Rabbit Lake and the bed of the outlet channel connecting Rabbit Lake and Clinker Lake and to determine that the plaintiff was the sole owner of said lake bed and the sole owner of all iron ores and other minerals, on, in or under said lands to-

gether with the exclusive right to enter on said lands and explore for and remove such minerals together with the right to regulate, control and divert the waters aforesaid and to determine that the defendants, and none of them, have any estate or interest in or lien upon said land.

II

That, by stipulation of the parties through their respective attorneys, entered into in open court at the commencement of the trial, this action was consolidated for trial with Case No. 23151, involving a portion of the bed of the east bowl of Rabbit Lake; with Case No. 22253 involving the beds of Clinker Lake and the outlet stream from Clinker Lake which empties into Turner Lake, also known as Curley Lake; with Case No. 22254 involving the beds of Turner Lake, also known as Curley Lake, and the outlet stream from Turner Lake which empties into Mahnomen Lake; with Case No. 22266 involving the beds of Mahnomen Lake and the outlet stream from Mahnomen Lake which empties into Pascoe Lake; with Case No. 22230 involving the beds of Pascoe Lake and the outlet stream which empties into Little Rabbit Lake; and with Case No. 22265 involving the beds of Little Rabbit Lake and the outlet stream which empties into the Mississippi River.

III

That, by stipulation of the parties through their respective attorneys, entered into in open court at the commencement of the trial, it was agreed that the issue to be submitted for the decision of this Court was the navigability or non-navigability of the aforesaid waters constituting the

APPENDIX B

so-called Rabbit River or Rabbit River Chain as of May 11, 1858.

IV

That Rabbit Lake is sometimes called Big Rabbit Lake, to distinguish it from Little Rabbit Lake, and it is to be noted that the map of the original government survey of Township 46, Range 29, introduced at the trial as defendants' Exhibit 82 and State's Exhibit 87, erroneously designates Mahnomen Lake as Rabbit Lake. It was agreed by all parties upon the trial that such designation was erroneous and that the lake designated on Exhibits 82 and 87 as Rabbit Lake was, in fact, Mahnomen Lake, and was so referred to throughout the trial.

V

That Rabbit Lake and the outlet channel connecting it with Clinker Lake are bounded by the following governmental sub-divisions or tracts of land, namely:

Lots Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), and Ten (10), of Section Nineteen (19), Township Forty-seven (47), Range Twenty-eight (28); Lots One (1), Two (2), Three (3), Four (4), and Five (5), of Section Twenty (20), Township Forty-seven (47), Range Twenty-eight (28); Lots One (1), Two (2), Three (3), Four (4), Five (5), and Six (6), of Section Twenty-nine (29), Township Forty-seven (47), Range Twenty-eight (28); Lots One (1), Two (2), Three (3), Four (4), and Five (5), of Section Thirty (30), Township Forty-seven (47), Range Twenty-eight (28); Lots Three (3), Four (4), Five

APPENDIX B

(5), Six (6), and Seven (7), of Section Twenty-four (24), Township Forty-seven (47), Range Twenty-nine (29); and Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), and Eight (8), of Section Twenty-five (25), Township Forty-seven (47), Range Twenty-nine (29); Lot Seven (7) of Section Twenty-nine (29), and Lot Six (6) of Section Thirty (30), Township Forty-seven (47), Range Twenty-eight (28); Lots Six (6) and Seven (7), Section Twenty-five (25), Township Forty-seven (47), Range Twenty-nine (29).

VI

That the defendants named in this action are the owners in fee or claimants of an interest in all of the aforesaid lands.

VII

That Rabbit Lake is a meandered lake situated in Township 47, Range 29, and Township 47, Range 28, in Crow Wing County, Minnesota, and generally consists of two bodies of water connected by a channel or thoroughfare, which bodies are locally described as being the "East Bowl" and the "West Bowl." The lake area of both bowls covers approximately 1160 acres, and the depth of the water varies throughout the lake. That Rabbit Lake has never had any inlet from the Mississippi River and has no stream running into it except a very small stream running from Carlson Lake, which lies to the East, which stream contributes but little water to Rabbit Lake, the highest measured flow being 82 gallons per minute.

APPENDIX B

That, at the present time, and for some years past, the only outlet from Rabbit Lake was the so-called "cut-a-way" or thoroughfare which runs from the south side of the West Bowl of Rabbit Lake to Clinker Lake. That said cut-a-way was not a natural outlet, but was man-made sometime after the original government survey of that area, which survey was completed on June 7, 1871. That said government survey shows that Rabbit Lake was meandered and the interior subdivisions of Township 47, Range 29, were surveyed in the months of May and June, 1871, and that at that time the surveyor noted no outlet of any kind at Rabbit Lake and no outlet where the present cut-a-way outlet exists. Other evidence, of an abundant and compelling nature, indicates that there was on May 11, 1858, no outlet from Rabbit Lake at the site of the present cut-a-way, and no outlet at any other place except possibly at a point between the West Bowl of Rabbit Lake and Mud Lake, which could have existed only for a few days at times of extreme high water, and then could not have been of sufficient depth to afford passage or navigation of any kind. Therefore, the court specifically finds that Rabbit Lake, on May 11, 1858, was not connected by water or by any navigable waterway with any other body or bodies of water so as to make it possible or practicable to use said lake or any connecting waterway as a highway of commerce over which trade and travel could have been conducted in the customary mode of trade and travel on water.

VIII

That the waters of Rabbit Lake have maintained a substantially uniform level during the years past, varying only

with the ordinary seasonal fluctuations common to all bodies of water throughout northern Minnesota, and it is unlikely that the waters of said lake were in the year 1858 appreciably higher than they have been during the recent years when the levels were recorded. The earliest record of said water level introduced in evidence at the trial was that of the year 1912, when the water was at 1199.1 feet above sea level. From that year on until the year 1950, the water level fluctuated with the years and seasons, the lowest level being 1196.2 feet in the year 1934, and the highest level being approximately 1199.8 feet reached in the West Bowl of the lake in March and April of 1950, at which time there was being pumped from the East Bowl into the West Bowl approximately 16,000 gallons per minute, and at which time the water levels and flood conditions in the vicinity were the highest in the memory of living men. That, since about the year 1936, the State of Minnesota has maintained in the stream below Clinker Lake a control dam; that the plaintiff has wholly failed to present to the Court any records of the height of logs or planks maintained in said dam, although it had such records under its control. That said control dam obviously held up the water in Rabbit Lake, but without evidence of the height of the dam it is impossible to determine the exact amount by which said dam raised the water. From all the evidence, it appears that, in the state of nature and in the years immediately before and after the year 1858, the ordinary water level of Rabbit Lake was approximately 1198 feet above sea level.

That at the level of 1198 feet there could not be sufficient water flowing out of the so-called cut-a-way between Rabbit

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Lake and Clinker Lake, or through the possible outlet from Rabbit Lake to Mud Lake to form or constitute a waterway or water-course which could furnish any use or facility for commerce or travel of any kind.

IX

That Rabbit Lake has never been used for the purpose of floating or driving logs, because it furnished no route for such uses that was of any practical value. That the absence of any natural inlet or outlet or water connection with any other navigable waters made it unfit and unsuitable for the driving of logs or lumber or the transportation of any other products of the country, even with the aid of artificial means.

X

That for some years after 1858 Indians lived in the vicinity of Rabbit Lake, and they did at various times canoe on and across the lake; that they probably did occasionally transport in their canoes wild rice or other foodstuffs for their personal use or for exchange, but the lake was not used by the Indians as the whole or any part of an established water route and was not used by the Indians for any purposes of commercial transportation, because it did not of itself afford the Indians a water route of any consequence, and because there were other suitable and navigable water routes in the vicinity connecting the points between which the Indians habitually traveled. That the Indians did not use the so-called cut-a-way between Rabbit Lake and Clinker Lake and the stream running out of Clinker Lake as a route of travel at any time. That such Indian travel as existed upon Rabbit Lake was not for commercial purposes but was only such as

the Indians habitually did in their wanderings for hunting, fishing and visiting.

That there was never any existing water route used by the Indians or others between Mille Lacs Lake and Rabbit Lake. That while there was Indian travel between said points, just as there was Indian travel between many points throughout Minnesota and the Northwest, such travel was not wholly or always by water, but was in many, if not most, instances largely travel overland. That whatever Indian travel there was between said points was not of a commercial nature, since the mere transportation of a few furs or supplies for domestic use did not and could not constitute commerce within the meaning of the law. That there was not at any time any water connection between Mille Lacs Lake and Rabbit Lake, either by flowing streams or lakes connected by practicable or usable portages.

That Rabbit Lake was never used by the early settlers in the vicinity for commercial transportation of any kind, but such use as the settlers might have made of the lake was confined solely to the ordinary non-commercial uses of boating for pleasure, swimming or fishing. That Rabbit Lake was not susceptible of being used as a highway of commerce by the settlers, because it afforded them no highway or avenue of practical importance.

XI

That on May 11, 1858, Rabbit Lake by itself was not navigable and was not susceptible of being used as a highway of commerce over which trade or travel was or could have been conducted in the customary mode of trade and travel on water. That Rabbit Lake in connection with the other

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waters involved in the trial of these actions was not navigable and was not susceptible of being used as a highway of commerce over which trade or travel was or could have been conducted in the customary mode of trade and travel on water.

As Conclusion of Law

That defendants are entitled to judgment that plaintiff take nothing by this action and that defendants recover their costs and disbursements herein.

Let Judgment be entered accordingly.

Dated April 17, 1954.

ARNOLD C. FORBES
Judge of the District Court

(Title omitted.)

JUDGMENT

To: Hon. Miles Lord, Attorney General, 102 State Capitol, St. Paul 1, Minn., attention Victor J. Michaelson and G. L. Ware, and to

Attorneys for defendants per attached list.

YOU ARE HEREBY NOTIFIED, That a Judgment in the above entitled cause was, on the 13th day of June, A.D. 1958, filed and entered in the office of the Clerk of said District Court.

Dated June 14th, A.D. 1958.

LEONE BOUCK, Clerk

APPENDIX C

UNITED STATES CONSTITUTION

Article IV, Section 3

"New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress.

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular state."

ACT OF CONGRESS

May 11, 1858

11 Stat. 413

"Whereas, An act of Congress was passed February twenty-sixth, eighteen hundred and fifty-seven, entitled 'An act to authorize the people of the Territory of Minnesota to form a constitution and state government preparatory to their admission into the Union on an equal footing with the original states'; and, whereas, the people of said Territory did, on the twenty-ninth day of August, eighteen hundred and fifty-seven, by delegates elected for that purpose, form for themselves a constitution and state government, which is republican in form, and was ratified and adopted by the people at an elec-

tion held on the thirteenth day of October, eighteen hundred and fifty-seven, for that purpose; therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever.

* * * * *

"Sec. 3. And be it further enacted, That from and after the admission of the State of Minnesota, as hereinbefore provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within that State as in other States of the Union; and the said State is hereby constituted a judicial district of the United States, within which a district court, with like powers and jurisdiction as the district court of the United States for the district of Iowa, shall be established; the judge, attorney and marshal of the United States of the said district of Minnesota shall reside within the same, and shall be entitled to the same compensation as the judge, attorney and marshal of the district of Iowa; and in all cases of appeal or writ of error heretofore prosecuted and now pending in the supreme court of the United States, upon any record from the supreme court of Minnesota Territory, the mandate of execution or order of further proceedings shall be directed by the supreme court of the United States to the district court of the United States for the district of Minnesota, or to the supreme court of the State of Minnesota, as the nature of such appeal or writ of error may require; and each of those courts shall be

APPENDIX C

the successor of the supreme court of Minnesota Territory, as to all such cases, with full power to hear and determine the same, and to award mesne or final process therein."

APPENDIX D

STATE'S EXHIBIT A

PAYMENT FOR SURVEY

Northern Superintendency
Saint Paul March 16th, 1857

Sir:

I have today settled with Samuel A. Medary for the surveying of the exterior lines of the Gull Lake and Rabbit Lake Reservations, by paying him $625.97. The terms of the contract made with Mr. McAboy by Gov. Gorman are so exceedingly indefinite and loose, that it was unpleasant to me to have any thing to do with the matter. Mr. Medary charges for running a random line from Long Lake Portage to the head of Gull Lake, which had to be done so as to find the bearing by which the Head of the Lake could be reached from the former point. I refused to allow the charge without its first being submitted to and approved by you. I think the Surveyors somewhat misunderstood the intention of the Treaty, when they ran half a mile North West of the head of the Lake. I think they would have done better to have run the line as indicated by the pencilled mark, but at the same time I do not think they are to blame for it. The late Superintendent ought to have given them proper instructions, and if he himself was uncertain as to the proper construction of the Treaty, he ought first to have consulted you in relation to it.

The creek at the head of Gull Lake is, as Mr. Medary reports, dead water up to the point where the line strikes it, and he insists that this point should be considered the head of the lake.

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Copies of the field notes[1] and maps are herewith forwarded.

Respectfully
Your obt Svt
/s/ FRANCIS HUEBSCHMANN
Supt.

Hon. Geo. W. Manypenny
Com. Ind. Affs.
Washington City, D. C.

[1]Only the map is printed herein. The field notes have been filed with the clerk of this Court.

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FIELD NOTES

THE UNITED STATES

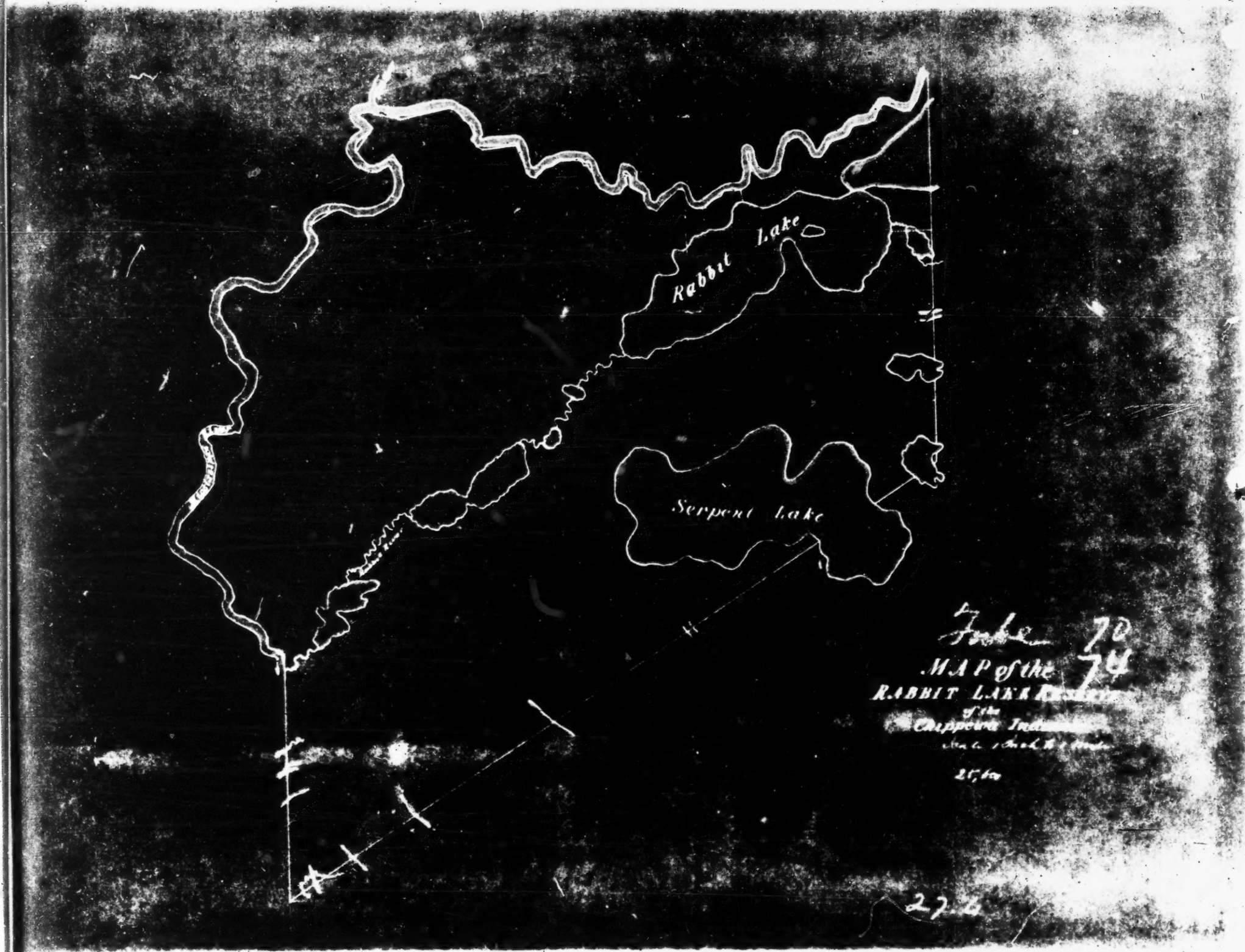
To SAML A. MEDARY, Dre

Date		Dolls.	Cts.
1857	To surveying a random line from		
March 16	Long Lake Portage to the head of Gull Lake, (not included in the bill for the Gull Lake Reservation) the reading of the treaty compelling the extra work to be done of 14 miles 9 chains at $ 6½ per mile	91	00
	Paid to Sherwood Hough for the Affidavits attached to the field notes of the Surveys of the Gull Lake and Rabbit Lake Reservations	2	00

Received at .....185.., of FRANCIS HUEBSCHMANN, Sup't of Indian Affairs, ... Dollars, in full of this account. 100

(Duplicates)

I CERTIFY, on Honor, that the above account is correct and just, and that I have actually, this day of 185 , paid the amount thereof.


Rabbit Lake
Serpent Lake
MAP of the
RABBIT LAKE
of the
Chippewa

APPENDIX D

STATE'S EXHIBIT C

Chippewa Agency Aug. 18, 1857

Sir

Enclosed you will find an agreement of the Rabbit Lake Chippewas allowing D. Morrison of St. Anthony to cut Pine timber on their reservation.

These Indians are the only ones in the whole nation that raise a surplus of Corn, Potatoes, &c. They have about thirty acres under cultivation, and wish to extend their improvements, perhaps about as fast as Mr. Morrison would take the Pine off the land. They came to me like men and wished to know if I would assist them in making the agreement, with which request I, of course, complied. It is a good contract for the Indians, and I am anxious that it should be carried out. Mr. Morrison will build their houses this fall if the contract is approved by the Commissioner of Indian Affairs in time for him to do so.

Respectfully
Your Obt. Svt.
s D. B. HERRIMAN
Ind. Agent

Hon. J. W. Cullen
Supt of Ind Affs
St. Paul
T. T.

APPENDIX D

STATE'S EXHIBIT F

Department of the Interior
Office of Indian Affairs
October 27th, 1857.

Thompson Hon.
Secy. of the Interior;

Sir:—

I have the honor to transmit herewith a copy of a letter from Superintendent Cullen, of the 19th of August last, upon the subject of a contract made by the chiefs and Headmen of the Rabbit Lake band of Chippewas, with Dorilus Morrison Esq. of St. Anthony, Minnesota, in which they agree that said Morrison shall have the privilege of erecting a Saw Mill within the reservation provided by the 2nd article of the treaty of February 22nd, 1855, and of cutting pine and cedar timber thereon for the space of ten years. I also enclose copies of the accompanying papers, consisting of said executed contract and a communication from Agent Herriman, in which he recommends the approval of the same, from which you will perceive that it is suggested that this agreement will be advantageous to the Indians, not only in clearing the land for the advance of their improvements, but in providing them with comfortable houses for the winter, by the performance of the contract on the part of Morrison. Yet notwithstanding this apparently fair representation the article of agreement developed certain facts which, in my opinion, should not be overlooked. Mr. Morrison limits his operations to the cutting of pine and cedar timber, and as he would be privileged to make his own selections, self interest would prompt him to remove the choice pine and cedar, and leave

the scrubby ash and small growth of timber standing as an incumbrance upon the ground.

This process of clearing within the term of years specified would no doubt leave the reservation with but little valuable timber and with more encumbrances than existed prior to the contract; consequently the great labor of clearing the land would be left for other hands; although the Agent urges the approval of the contract in consideration of clearing the soil for the advance of improvements.

I find by an examination of said agreement, that only one Chief has signed it, whose name appears in connection with the treaty, and therefore it is doubtful whether the proper authorities of the band were parties to the contract; which would be fatal to its validity.

In view of the execution of contracts of a similar character which should stand or fall upon the decision of the principle involved in this case, I deem it advisable to present the question of policy connected with this subject for your consideration and such action as you may adjudge proper in regard to the approval or disapproval of such agreements.

The removal of valuable timber from Indian reservations would probably have a tendency to depreciate the value of the lands, and if so the pecuniary interests of the Indians could not be promoted thereby. Again in the case under consideration, the ultimate fee of the lands being in the United States, the Indians if permitted to execute agreements of this character, might greatly diminish the value of the reversionary interest of the government.

Under certain provisions of the treaty to which reference is had, the Department can exercise the discretion of having a Saw Mill erected within the reserve for the benefit of the

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Indians, if it should be regarded as necessary to furnish lumber for building their houses; but I presume that the Rabbit Lake band, with a carpenter to instruct them could build such houses as are described in the aforesaid contract without the agency of Mr. Morrison.

The establishment of a precedent predicated upon the question of policy presented in this case will exert a powerful influence for or against the future prosperity of the Indian tribes of our Western Territories, who are being rapidly brought in direct contact with the unyielding tide of speculative emigration, and therefore I respectfully submit the subject for the decision of your judgment, and have to request your instructions for the government of this Office.

Very respectfully
Your obedient Servant
s J. W. DENVER
Commissioner

Memorandum of an agreement made and entered into the day and year below mentioned between the Chiefs and head men of the Rabbit Lake band of Chippewa Indians of the first part; and Dorilus Morrison of Saint Anthony, Minnesota, of the Second part: Witnesseth, That by the 2nd Article of a treaty between the United States and the Chippewas of the Mississippi made at Washington City on the 22nd of Feb'y, 1855; a reservation was set aside at Rabbit Lake, being the 2nd reservation mentioned in said article 2nd; and by the 9th article of said treaty the Indians agree "to appropriate their means to the erection of houses, opening farms,

the education of their children, etc., etc." and to enable them to do so, the said chiefs and head men of Rabbit Lake hereby agree to give the said Dorilus Morrison the exclusive right to cut and take away so much of the timber on their said reservation for the period of ten years as he may see fit, provided it does not interfere with their fire wood or fencing timber; the right hereby conveyed to be confined exclusively to the pine and cedar upon said reservation. They also grant to the said Morrison the exclusive right to cut the hay upon said reservation over and above what they may not want for their own use. The above rights and privileges are granted upon the conditions following, viz: As soon as the agreement shall be approved of by the Commissioner of Indian Affairs, and as soon as the said Morrison shall be notified of the approval, he shall deliver to the said band through the United States Indian Agent for the Chippewas, one good yoke of work oxen with yoke and chain, and also one good plow suitable for plowing; He shall in each winter for the period of ten years deliver the said band or through their agent at their said reservation fifteen barrels of good superfine flour, and four barrels of good mess pork. He shall also build the first year eight comfortable log houses not less than 16 by 20 feet on the ground, and one story high, and furnish for each a small cooking stove. He shall also build thereafter two houses of not less size than mentioned above within the following nine years, at such times as the agent may direct and furnish a cooking stove for each. The said buildings shall be erected upon the said reservation at such places as the chiefs and head men may select, and shall be turned over to them for the use of their said band when finished. The right is hereby granted to the said Morrison to erect and keep in

repair a saw mill on said reservation and to have the exclusive right to use the same for the said ten years, at the expiration of said time the said mill shall be turned over to the said band of Indians. It is expressly understood that the United States Indian Agent for the said Indians shall be satisfied that the said Morrison complies with his part of this agreement from time to time as herein stipulated.

In witness whereof we have hereunto affixed our marks at the Chippewa Agency this twenty-third day of July A. D. 1857.

Marks

Iawe showe e ki shig) X (Seal)

CHIEFS

May shuck ke shig) X (Seal)
Naw gaun e gaw bow) X (Seal)
Kaug aug ence) X (Seal)
Maun um aig) X (Seal)
Caw gong) X (Seal)
Kaw gay bin ais) X (Seal)

Headmen

Wand e naw) X (Seal)
Ed donh) X (Seal)
Song way way gwon) X (Seal)
May shuck e aus ung) X (Seal)
Kaw gog No. 2)

In presence of
D. B. HERRIMAN
Ind. Agent
PAUL H. BEAULIEU
U. S. Interpreter

APPENDIX D

STATE'S EXHIBIT L

OFFICE SUPERINTENDENT OF INDIAN AFFAIRS

St. Paul, Nov 14, 1861.

Sir:

I transmit herewith a petition from the chiefs and Headmen of the Rabbit Lake Band of Chippewa Indians relative to the contract of Dorillus Morrison for cutting timber on their Reservation.

Very respectfully
Your Obt Sevat
/s/ CLARK W. THOMPSON
Supt. Ind. Affairs

HON. WM. P. DOLE
Comr. Ind. Affairs
Washington, D. C.

To our Father, the Hon. Lucius C. Walker, Indian Agent of the Chippewas of the Mississippi.

We the undersigned Chiefs and Headmen living on the Rabbit Lake Reserve, hearing that our Great Father had sent a commissioner to look after our rights, in regard to the cutting of timber upon our Reservation by our Dorrilus Morrison, we expected to see him among us and lay our complaints before him, but we hear that he has passed through the country, and we know he did not come upon our Reservation to see us, but sent a man, who had been in the employ of Mr. Morrison, to measure the houses built, and the timber

cut by him, and we fear that justice will not be done us, therefore our Father we wish to lay our complaints before you that you may intersede for us with our Great Father.

We understood from our Father Herriman, at the time the contract was made that it should exist only for five years, and that there should be but one Camp upon our Reservation with but 22 men—that Mr. Morrison was to build for us the first Winter *eight* houses, and two more before the logs were taken from the ground and were to have ten cooking stoves put in them as soon as they were finished, together with sufficient furniture and pipe for each; we were also to receive annually fifteen barrels of super fine flour, and four barrels of the best kind of mess Pork, and were to be paid extra for all the hay cut and haul wood used in his camp; we were also to receive a pair of good horses together with harnesses and a good waggon, and one yoke of oxen—Instead of all these things, the first winter, Mr. Morrison had three camps upon our Reservation with twenty horses and over sixty men; and the last winter he had three camps with sixty men, four pair of horses at one camp, at another six yoke of oxen, and at the other five yoke. He built us the first winter three pretty good houses, five other houses were built but they were so poor and miserable we did not receive them, nor never will, and these are all the houses that have been built; we received eight stoves, but every one proved worthless having broke the first week of use. The flour we received the three first years was of good quality, but the last year it was made of oats; for three years the pork was of good quality, but not clean, the last year it was nothing but heads, shanks and tails. We have never received the horses, harness, nor wag-

gon, nor anything for the haulwood and hay cut for the camps, which is a great amount.—The oxen we received.

And now, our Father, we say, that we have been miserably treated, misused, and grossly cheated—That our Reserve is being ruined, our hunting grounds destroyed, our lands made valueless, and our young men becoming impatient under the wrongs thus heaped upon them are hardly restrained from committing deeds of violence upon the whites that come upon Reserve—We were made to sign the contract by inducements held out to us, which we then believed would be fulfiled, and took no security or guarantee that it would be, but trusted to the honesty of the white man, and now we find that the intention was to deceive and cheat us, and take all that was valuable from our homes, and if ever our Great Father should desire our lands we should have nothing but a barren Reserve to grant him. We have been offered far more by other parties to cut timber, but we do not want any more cut upon our Reserve.

Mr. Morrison is preparing to lumber this winter, having cut a large amount of hay, and is now sending forward his men, we therefore beseech you Father, to intercede for us with our Great Father, who we believe thinks of us, and will attend to the wants of his children to stop this man from cutting our Timber and destroying our homes—We are willing to do anything that you our Father desire, but if our timber is cut this winter we fear that our young men will become unmanageable and commit depredations which it will be beyond our power to restore—

And now our Father, having presented our complaints, we leave it in your hands.

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Their marks

May-zhuc-ke-ke-zhig X
Suic-yaw-showe-e-ke-zhig X
Hau-game-e-gaw-bow X
Kay-bay-we-ind X
Shin-gway-bay X
Kaw-yaw-ke-waib X
Waw-owb-bansh X
Mous X
Kaw-gong X

Witness
s LUCIUS C. WALKER

STATE'S EXHIBIT N

Washington, April 7th, 1862

Sir:

I herewith transmit Agent Walkers Report, and accompanying papers upon the Contract between Dorillus Morrison and the Rabbit Lake Indians.

Very respectfully
Your Obt Servt
s CLARK W. THOMPSON
Supt. Ind. Affairs

HON. WM. P. DOLE
Commr. Ind. Affairs
Washington, D. C.

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In this case Agt. Walker reports what Morrison did during the winter of 1858-9 and 1860-61

Cut 9,089,017 ft. Logs valued at	$4,544.51
That he built for the Indians 8 houses	$1,000.00
furnished 8 Cooking Stoves	150.00
" 1 Yoke Oxen &	200.00
Expended in clearing land opening roads & provisions estimated by him at	5,000.00
	$6,350.00

From his investigation Agt. Walker thinks that Morrison expended for the Indians during those winters an amt. equal to the value of the timber cut—

For the present winter the timber M will cut is estimated at 6,000,000 ft. and its value as above is $3,000

On this he claims that he has already expended

in provisions	$1,000
Contract to pay in Money	800
30 bbls. S. F. Flour (Estimate $8.00 bbl.) (Large Estimate)	240
8 Ms Pork (1 Estimate $18)	144
	$2,184

Short of value of timber $816

By the contract there is no limit to the amt. of timber he may cut for the consideration above stated.

State of Minnesota
Hennepin County, ss

Dorilus Morrison being duly sworn deposes says, That he resides at the Falls of St. Anthony, Hennepin County—has

for the past six years and that he the person who made a written agreement with the Rabbit Lake Band of Chippewa Indians to cut Pine Timber upon their Reservation through their Agent David Harriman Esq. and that the same was approved by said Agent Harriman and also by the Superintendent of Indian Affairs for this State J. W. Cullen, Esq. I am acquainted with the Lumber business and value of Stumpage and Pine Logs. I have made full and complete payments each and every year since the making of said agreement to said Band of Indians and I have their receipt for the same. I have expended a large amount upon said Reservation in building houses and furnishing the same, which has been done as required in said agreement, making roads, clearing streams, and Rivers with payments to the Indians and many other expenditures on account of the same. The amount expended and paid to the Indians and for said operations up to the summer of 1860, over and above what I have received from the full sales of all Logs and Timber cut upon said Reservation up to said time was and is more than Ten Thousand Dollars ($10,000) and that I have cut or caused to be cut upon the Reservation since the summer of 1860 and up to the fall of 1861 not more than Fifty two hundred thousand feet (5200th) of Logs and Timber and that the value of said Stumpage for the winter of 1860 and 1861, as compared with the stumpage on Rum River would not exceed in value the amount paid to said Band of Indians in February 1861. During the past four years I have given the said Band of Indians at different times in consequence of their destitution many Brands of Flour and various other articles for which I have made no charge or account of to the In-

dians or any one else over and above their payments due them as per agreement—I gave the Chief of said Band a Horse in Jany 1861, for which I have received no pay—I have often been upon said Reservation know the Chief he has at all times expressed himself to me as satisfied and treated me as having good and friendly feelings. Have used all my influence to keep whiskey from the Indians and their Reservation—never gave them Forty Gallons of whiskey or any other quantity and have always forbid my men giving them any or allowing it upon the Reservation—Never received any blank vouchers from J. W. Lynde or any other person or gave any in relation to the Reservation. I built Eight houses in the fall of 1857 upon the Reservation and furnished all that I was required to.

The amount expended as refered to above was in supplies to Indians, building the Houses and for oxen and tools making roads and clearing to and near the houses. And also in building dams and roads for the better facilitating my business—Should say that one half the amount of the Ten Thousand dollars, has gone to and for the benefit of the Indians.

s DORILUS MORRISON

State of Minnesota
County of Hennepin, ss

Nathl G. Garcelon being duly sworn deposes and says—that he resides at the Falls of St. Anthony, Hennepin County and has resided here most of the time for the past five years, is a Lumberman and has been engaged in cutting, hauling and driving logs more or less for the past fifteen

APPENDIX D.

years. Am well acquainted with the business and quality logs. Have helped drive logs from Rum River to the Falls of St. Anthony in said County of Hennepin and I shall say the cost of driving the same 50 cents per M. I have cut, hauled and driven logs upon the Mississippi river and its tributaries. I cut and hauled logs upon the Rabbit Lake Indian Reservation during the winter of 1860 and 1861 for Dorilus Morrison. I am acquainted with said Reservation. I helped drive the logs to St. Anthony and should say it cost one dollar and 25 100 per M. I am engaged in cutting and hauling logs this winter (1862) for said Dorilus Morrison upon said Indian Reservation he is to pay me Two dollars and 25 100 per M for delivering them upon the bank of the river. I have also Contracted with the said Morrison to drive all of the logs cut the present winter by Messrs Heywood, Libby and Mysell from the Indian Reservation to St. Anthony at from 75 cents to one dollar and 25 100 per M. Some of them at 75 cents per M. Some at one dollar per M and some at one dollar and 12 100 per M and much the larger quantity at one dollar and 25 100 per M. I am acquainted with the Timber and logs upon the Reservation, and their value and quality and also Rum River logs and Timber. The Rum River timber and logs *are of more value*. The logs are finer and more clear timber comes from them. Should say Rum River logs worth one dollar per M more than logs cut on Rabbit Lake Indian Reservation. Logs can be cut, hauled and driven from Rum River to the Falls of St. Anthony for from 75 cents to one dollar per M less than they can be cut, hauled and driven from said Indian Reservation to the same place. A large amount has been expended in building dams, Bridges, clearing streams and making roads

upon the above mentioned Reservation with the past three or four years, cannot say how much. I have explored the Reservation extensively and the quantity and quality of the timber upon the same is much less and of less value than has been represented. The distance from the Falls to St. Anthony to the Rabbit Lake Indian Reservation is about one hundred and fifty miles by the road as traveled, while the distance by the river to drive logs is much more. Most of the Lumber upon the within named Reservation must be hauled into Lake and from there driven into the Streams and Rivers which will make it much more expensive—and it cost no more to cut, haul and drive good logs than it does poor ones.

N. G. GARCELON s

Subscribed and
Sworn to this 25th
day of January A. D. 1862.
Before me
s—L. ORTMAN
Notary Public
Hennepin Co., Minnesota
(Notarial Seal)

State of Minnesota
County of Hennepin, ss.

Calib D. Dorr being duly sworn—deposes and says that he resides at the Falls of St. Anthony in the County of Hennepin and has for the past nine years—and that he has been engaged in Lumber more or less during all of said time and is acquainted with the business. Have cut logs for myself

and scaled for other parties mostly upon Rum River. Have owned Pine Lands upon the said Rum River, had charge of Pine Lands for others. Have been accustomed to permit for stumpage. The price for stumpage upon said Rum River is *fifty cents* per M—in some cases a little higher, do not know of any one who pays more than *Seventy five cents* for this winter,—Should think Fifty Cents the usual price paid and all that any one can afford to pay taking unto account the Price of logs and Lumber. The cost of hauling logs into Rum River I should think would be from one dollar and 50 100 to one dollar and 75 100 per M feet—and the cost of driving the same to this market or place would be from 40 to 60 cents per M should say an average would be about 50 cents per M. I mean upon the Rum River and its Tributaries where Pine is usually cut—It would in my opinion cost less to cut haul and drive logs upon Rum River than upon the Mississippi and its tributaries as the distance is much less and facilities better. How much less I could not tell as my operations and knowledge of the business have been mostly upon the Rum River and its tributaries. The average distance from Falls of St. Anthony to where logs are cut upon Rum River I should say was about seventy miles. I am acquainted with the value and quality of logs from the different rivers above the Falls of St. Anthony looked over the logs cut by Dorilus Morrison from the Rabbit Lake Indian Reservation as they came to this market and also logs that came from Rum River. Should say the Rum River logs were worth fifty Cents to one dollar more than the logs cut upon the said Indian Reservation as the latter are smaller and more knotty and much less clear lumber in them. The Indian Re-

serve logs and the Rum River logs were mixed up in the boom and Pond at this place and I had a good chance to examine them.

/s/ CALEB D. DORR

Subscribed and Sworn to this 24th day of January A. D. 1862.
Before me
/s/ E. ORTMAN
Notary Public, Hennepin Co.
Minneapolis

State of Minnesota
County of Hennepin, ss.

Edward D. W. Murphy being first duly sworn deposes and says that he resides in the City of St. Anthony in said County, that he scaled the logs cut on the Rabbit Lake Reserve in the winter of 1857 and 1858, by Dorrillus Morrison;—that the lumber cut by him on the Reservation for that winter amounted to 1,869,000 feet—I have never scaled on the Reservation except at that time.

And farther deponent said not.

E. D. W. MURPHY /s/

Subscribed and
Sworn to before me
this 3d day of
February AD 1862.
ASHLEY C. MORRILL
U. S. Commissioner

APPENDIX D

State of Minnesota
County of Hennepin, ss.

Jonathan Chase being duly sworn deposes and says, that he resides in the County aforesaid, in the City of St. Anthony, That he has been in the lumber business for eight years. Have lumbered on the Rum River, the stumpage on that River in the years 1856 and 1857 was worth $1.00 per Thousand and 1861—2 .50c per thousand feet. Have never lumbered on the Mississippi,—The running logs to St. Anthony from the Mississippi will cost no more than the running from Rum River. The logs cut on Rabbit Lake Reserve were not as good as those cut on Rum River. I am acquainted with and examined the logs from both places—should judge the stumpage on the Reserve from the years 1856 and 1857 and up to the present winter was worth .50 cents per thousand feet.

JONATHAN CHASE s

Subscribed and Sworn
to before me this 3 day of
February 1862.
ASHLEY C. MORRILL
U. S. Commissioner

State of Minnesota
County of Hennepin, ss.

Mark T. Berry being duly sworn deposes and says that he resides at the Falls of St. Anthony and has for the past ten years and that he is well acquainted with the lumbering business and of the value of logs and lumber. I have been

APPENDIX D

Surveyor General of logs and lumber for this the 2d district of this State was elected by the Legislation. Have scaled (20) Twenty Millions per year that were cut above the Falls of St. Anthony and I have made frequent examinations as to the different qualities of logs—These cut upon Rum River and its tributaries are of more value as a general thing than those cut upon the Mississippi River and its tributaries. I should think Rum River logs worth from 50 cents to one dollar per M more than Mississippi river logs. I have run and scaled logs from the different rivers above here that were mixed together, very often and had a good opportunity to judge of their relative values—it cost no more to cut, haul and drive good logs than those of less value. I have scaled logs at various times in the woods that were being hauled for Stumpage—I saw the logs cut by D. Morrison in the winter of 1860 and 1861 from the Rabbit Lake Indian Reservation they were not so good as an average quality of Mississippi River logs. It is usual for men who haul logs to get the best they can from the Land.

M. T. BERRY /s/

Subscribed and Sworn to
before me this 24th day
of January A D 1862.
E. ORTMAN,
Notary Public
Hennepin Co., Minn.

APPENDIX D

State of Minnesota
County of Hennepin, ss.

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JONATHAN CHASE /s/

Subscribed and Sworn
to before me this 3 day of
February 1862.
ASHLEY C. MORRILL
U. S. Commissioner

State of Minnesota
County of Hennepin, ss.

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APPENDIX D

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M. T. BERRY /s/

Subscribed and Sworn to
before me this 24th day
of January A D 1862.
E. ORTMAN,
Notary Public
Hennepin Co., Minn.

APPENDIX D

STATE'S EXHIBIT O

H. L. MOSS
U. S. Attorney, Minnesota
Dated Jany 27, 1864.
Recd Feby. 3, 1864.

Reports the facts in relation to an alleged trespass on the public lands, and asks for instructions.
Copy enclosed to Comm. of Indian Affairs—Comr. Genl. Land office, Feb. 8, 1864 and their views requested and c.

U. S. ATTORNEY'S OFFICE
DISTRICT OF MINNESOTA

St. Paul, January 27, 1864.

Sir:

A complaint has been made to me of a trespass upon the public lands, and as some questions are involved as to the rights of the alleged trespasser to enter upon the lands, and commit the acts complained of, I regard it necessary, to report the facts as I understand them, and await instructions from you before I institute legal proceedings.

A few years since Dorelius Morrison of St. Anthony in this State, entered into a Contract with the Rabbit Lake Band of Chippewa Indians with the consent of the Indian Agent to cut pine timber upon the so called "Rabbit Lake reservation".

This contract was approved of by the Commissioner of Indian Affairs.

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Subsequently upon complaints of the Indians the contract was annulled by the Commissioner of Indian Affairs, and the matter of complaint by the Indians, was referred to Agent Walker, to ascertain the amount of compensation, Morrison should pay the Chiefs of this band, for the timber cut on their reservation during the winter 1861-2.

The agent Walker decided the amount $600—of which Morrison paid $300, at the time, and gave his bond for the payment of the balance. He has refused and still refuses to pay this bond.

During the winter of 1862-3, Morrison sent his laborers upon the reservation, who cut for him between six and seven millions feet of logs—which are still lying upon the reservation where cut, there not having been sufficient water in Spring and Summer of 1863 to run them out.

On the 19th day of March 1863 a treaty between the United States, and the Chippewa Indians (of which the Rabbit Lake band was a party) was ratified by the President, by the terms of which treaty, this reservation was ceded to the United States.

During the present winter of 1863-4, the said Morrison has a large force upon said land and has already cut over five millions feet of pine lumber.

These are the facts as reported to me by various parties.

The present Indian Agent (Monell) informs me that no official notice has been received of the transfer of the lands from the care of the Indian Department to the Land Department.

I am not aware that this is necessary.

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I know of no right, that Morrison has to strip the land of valuable timber.

I suggest that measures be adopted to ascertain from the Indian Department all that may have been done, by which Morrison claims the right and privilege to cut the timber on said reservation.

Also from the Land Department, as to what branch of the Government have the control & management of this reservation after the ratification of said Treaty.

You will please instruct me what to do in the premises, and if legal proceedings are to be instituted, what those proceedings shall be, to save to the Government the value of the timber now cut and lying upon the land.

Very respectfully,
Your Obt Svt
/s/ H. L. MOSS
U. S. Dis. Atty.

To:
HON. EDWARD JORDON
Solicitor I A,
Washington, D. C.

APPENDIX D

DEFENDANTS' EXHIBIT '139

STATE OF MINNESOTA
DEPARTMENT OF CONSERVATION

In the Matter of the Establishment of Natural Ordinary High Water Level in Rabbit Lake, Crow Wing County, and the Issuance of a Permit to Dyke off and Partially Drain the Same.

FINDINGS AND CONCLUSIONS

The above entitled matter duly and regularly came on for hearing on the 19th day of August, 1943 at ten o'clock a.m. at the Court House in Brainerd, Crow Wing County, pursuant to the duly published notice, before the undersigned, to whom were delegated the powers, authorities and duties of the Commissioner of Conservation in connection therewith. The Department of Conservation was present by E. V. Willard, Deputy Commissioner of Conservation, and acting on behalf of the Commissioner, Walter S. Olson, Director of the Division of Water Resources and Engineering, and Ray D. Nolan, Director of the Division of Lands and Minerals. The Commissioner of Conservation was represented by Mandt Torrison, Special Assistant Attorney General assigned to the Department of Conservation.

Appearances were made by the firm of Murphy and Cook of Crosby by F. C. Murphy, Gillette, Nye, Harries and Montague, by W. K. Montague and W. O. Bissonette, on behalf of the Youngstown Mines Corporation. A special appearance was entered by Messrs. Ryan, Ryan and Ryan of Brainerd on behalf of M. E. Ryan, William O. Petraborg, Alice Petraborg, Geneva Petraborg, Arthur Petraborg, Wal-

ter Petraborg and Helen Petraborg, who thereupon objected to the jurisdiction of the Commissioner of Conservation to grant any relief prayed for in the petition, or to permit the draining of any portion of Rabbit Lake, on the ground that the Commissioner had no right, power, or authority to grant a permit for the draining of the lake under the provisions of Laws 1937, Chapter 468, for the purposes expressed in the petition and the notice. The special appearance was duly noted in the record, over-ruled, and evidence was then adduced by the applicant and supplemented by witnesses called by the Special Assistant Attorney General.

From all of the evidence adduced, the Commissioner makes the following

FINDINGS OF FACT

I

That Rabbit Lake is located in Crow Wing County, has a surface area of approximately 1,200 acres and a drainage basin of approximately 6 square miles; that it consists of two bowls or portions commonly designated as the east and west bowl, sometimes referred to as Upper and Lower Rabbit Lakes, connected by a navigable channel, known as the narrows, which is spanned by a bridge bearing a county road or highway, with fills at the approaches extending into said channel; that the channel in its natural condition was approximately 700 feet in width and of an average depth of 12 to 15 feet; that the depth of the lake varies from the water's edge to approximately 35 feet in the deeper portions; that the average depth of the lake is approximately 20 feet.

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II

That there are located on said Rabbit Lake substantial summer resort facilities, affording the public and tourists accommodations for fishing, hunting, bathing, boating and other types of outdoor recreation; that both portions of the lake are extensively used by the public for said purposes.

III

That the east bowl of Rabbit Lake contains an underlying bed of high grade iron ore, estimated to contain between 7 and 10 million tons; that said ore can not be utilized or removed except by dewatering the east bowl of Rabbit Lake; that although the stripping overlying the ore can be removed by the use of bucket dredges, the iron itself cannot be removed without dewatering the east bowl; that removal of the stripping will be more economical if the dewatering is accomplished prior to such removal.

IV

That Rabbit Lake is a body of public water, navigable in fact and in law under the laws of Minnesota defining public waters, as well as under the federal tests of navigability; that Rabbit Lake and its surface have been used extensively since 1924 in the aid of exploring for, and developing the commercial utilization of the ore underlying a small portion of the bed of the east bowl of Rabbit Lake.

V

That the State of Minnesota is the owner of all ore in the bed of Rabbit Lake in its proprietary as well as sovereign capacity; that an iron ore mineral lease on a portion

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of the bed of Rabbit Lake was issued by the State of Minnesota under date of June 4, 1924 to the Rogers-Brown Ore Company, the name of which company is now the Youngstown Mines Corporation, applicant herein, which lease by reference is made a part hereof; that said lease provides for a royalty of fifty cents per ton, payable into the state school trust fund.

XI

That Rabbit Lake has an outlet in its west bowl which drains through Clinker, Curley, Mahnomen and Little Rabbit Lakes into the Mississippi River; that the capacity of such outlet channel is approximately 20,000 gallons per minute and the normal low water summer flow does not exceed 5,000 gallons per minute; that two state-owned and operated dams are maintained at the outlets of Clinker and Mahnomen Lakes for the purpose of controlling and regulating the flow of this water course and the lakes thereon; that the outlet dam at Clinker lake is at an elevation which controls the low water stages on Rabbit Lake; that the discharge capacity of the channel between such dam and the point of outflow from Rabbit Lake could be increased to a limited extent by channel cleaning improvements.

Dated at St. Paul, Minnesota, this 7th day of October, 1943.

E. V. WILLARD
Department of Conservation
Deputy Commissioner

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"STATE OF MINNESOTA
DEPARTMENT OF CONSERVATION

In the Matter of the Establishment of Natural Ordinary High Water Level in Rabbit Lake, Crow Wing County, and the Issuance of a Permit to Dyke off and Partially Drain the Same.

ORDER

Findings of Fact having been this day made and filed in the office of the Commissioner of Conservation,

NOW, THEREFORE, on the basis thereof,

IT IS HEREBY ORDERED:

I

That the natural ordinary high water level of Rabbit Lake in Crow Wing County, Minnesota, be set and determined at 1198.5 feet, mean sea level datum, 1912 adjustment.

II

That subject to the conditions hereinafter contained, the applicant, The Youngstown Mines Corporation, its successors or assigns, be granted permission to perform and do the following things in connection with the current and cross-section of Rabbit Lake, and the use and appropriation of waters therein:

1. To construct a dam or dyke across the narrows connecting Upper and Lower Rabbit Lakes from the shoreline of Lot 1, Section 30, Township 47, Range 28, upon the north shore of said narrows to Lot 4, Section 30, Township 47, Range 28, on the south shore of said lake at the narrows.

2. To pump the water from the east bowl of Rabbit Lake

into the west bowl of Rabbit Lake, by the use of not more than three pumps each of which shall have not more than 5,000 gallons per minute capacity, unless other equipment be approved in writing by the Director of Water Resources and Engineering, thereby dewatering the east bowl and lowering the level thereof, but not to exceed 32 feet below the natural ordinary high water level, such pumping to be done subject to such restrictions as to times and manner as shall be prescribed by written authority of the Director of the Division of Water Resources and Engineering.

3. To maintain a collecting and settling basin in the bed of the east bowl of Rabbit Lake or any portion thereof, the surface elevation of which settling basin shall not exceed 1173.00, mean sea level datum, except upon written consent of the Director of the Division of Water Resources and Engineering.

4. To deposit the stripping of the over-burden of the iron ore in such portions of the bed of the east bowl of Rabbit Lake as may be designated by written consent of the Director of the Division of Lands and Minerals, such consent to be granted in accordance with good engineering and mining practices, so as not to interfere with or over-burden other iron ore deposits or embarrass future operations involving any other mineral in the bed of the lake.

5. To divert the waters flowing into the east bowl of Rabbit Lake into the mine openings or into such collecting and settling basins and to pump the surface and subterranean waters in and under the area occupied by said mine, through the shaft of the old Kennedy Mine or other suitable openings or wells into the west bowl of Rabbit Lake at a rate sufficient to drain and dewater said ore body and mine workings.

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WILLIAM O. PETRABORG AND OTHERS v. EMIL ZONTELLI AND OTHERS YOUNGSTOWN MINES CORPORATION, APPELLANT[1]

217 Minn. 536

[1]Reported in 15 N. W. (2d) 174.

June 9, 1944

No. 33,727

Action in the district court for Crow Wing county to restrain defendants from damming off and draining a certain portion of Rabbit Lake in said county as a part of the development of an iron mine. After findings for plaintiffs, Graham M. Torrance, Judge, defendant Youngstown Mines Corporation appealed from an order denying its motion for a new trial. Affirmed.

Murphy & Cook, Gillette, Nye, Harries & Montague, and *J. B. Putnam,* for appellant.

Ryan, Ryan & Ryan, for respondents.

YOUNGDAHL, Justice.

This action was brought to restrain defendants from constructing a dam and draining the eastern section of Rabbit Lake in connection with certain contemplated mining operations thereon. The court permanently enjoined such activity. Defendant Youngstown Mines Corporation appeals from an order denying its motion for a new trial.

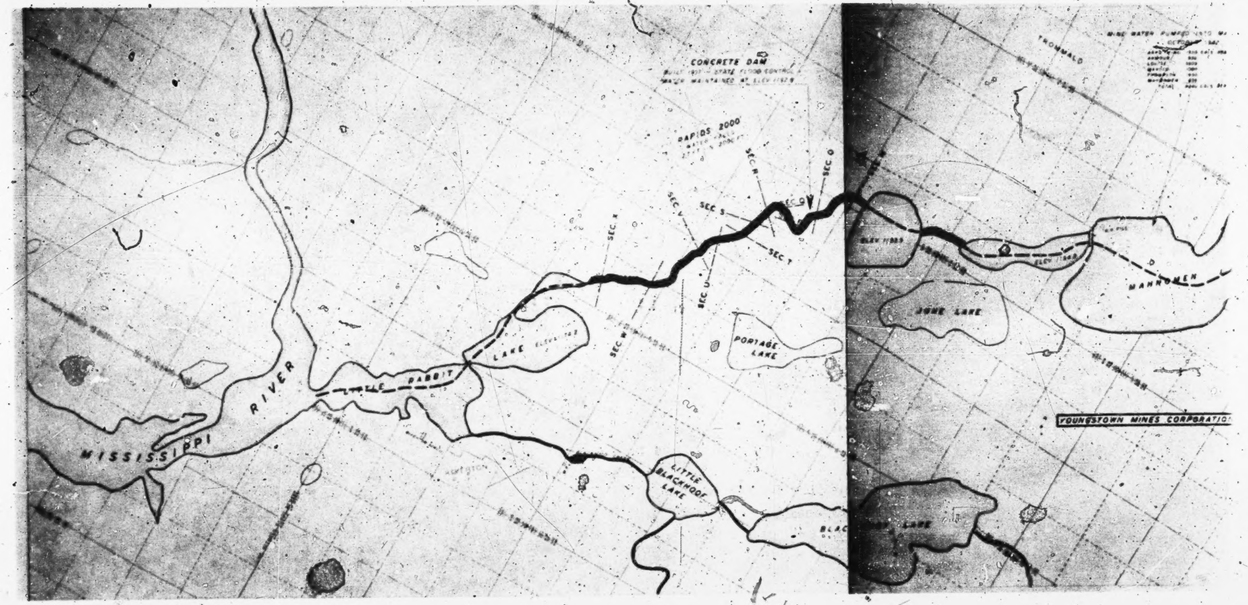
The trial court issued a temporary restraining order and an order to show cause why a temporary injunction should not issue. At the hearing on the order to show cause, affi-

davits were submitted and some oral testimony received. To secure a prompt determination of the important issues involved, the parties stipulated that the action be submitted to the court on the merits upon the affidavits and oral testimony received. Upon this stipulation the following material facts were established: Rabbit Lake is a meandered lake covering approximately 1,500 acres. It consists of two sections, lying east and west, connected by a narrower portion of the lake, locally known as the "Narrows," and draining eventually through small streams into the Mississippi River. Both portions of the lake as well as the Narrows are of sufficient depth to accommodate small craft such as rowboats and boats equipped with outboard motors and have in fact been so used by the public generally and persons living around the lake. Apart from its use for navigation, both sections have been used for swimming, fishing, and hunting. * * *

3. Youngstown takes the position that Rabbit Lake consists, in reality, of two lakes and that, since it proposes only to drain what it calls the east lake and the Petraborgs are located on what it terms the west lake, no riparian rights of theirs are damaged. The trial court found: "That while Rabbit Lake is comprised of two parts or sections, it is, in fact, one lake and has been so used by persons living on either section or end of the lake." The evidence sustains this finding. In fact, a finding to the contrary would not have been justified. Witness Herbert V. La Victoire, a property owner on the lake, testified: "It has always been considered as one lake. That is called Big Rabbit Lake. It is known generally as that." It appears that it was called "Big".

APPENDIX D

Rabbit Lake to distinguish it from "Little" Rabbit Lake, located near Riverton, Minnesota. The record indicates that it was the custom of the shore owners and public generally to boat and fish over both sections and through the Narrows, treating it as one large body of water.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SEC 34
SEC 35
SEC 36
LAKE
RABBIT
PORTAGE LAKE
MISSISSIPPI
RIVER
KITTLE BLACKFOOT LAKE
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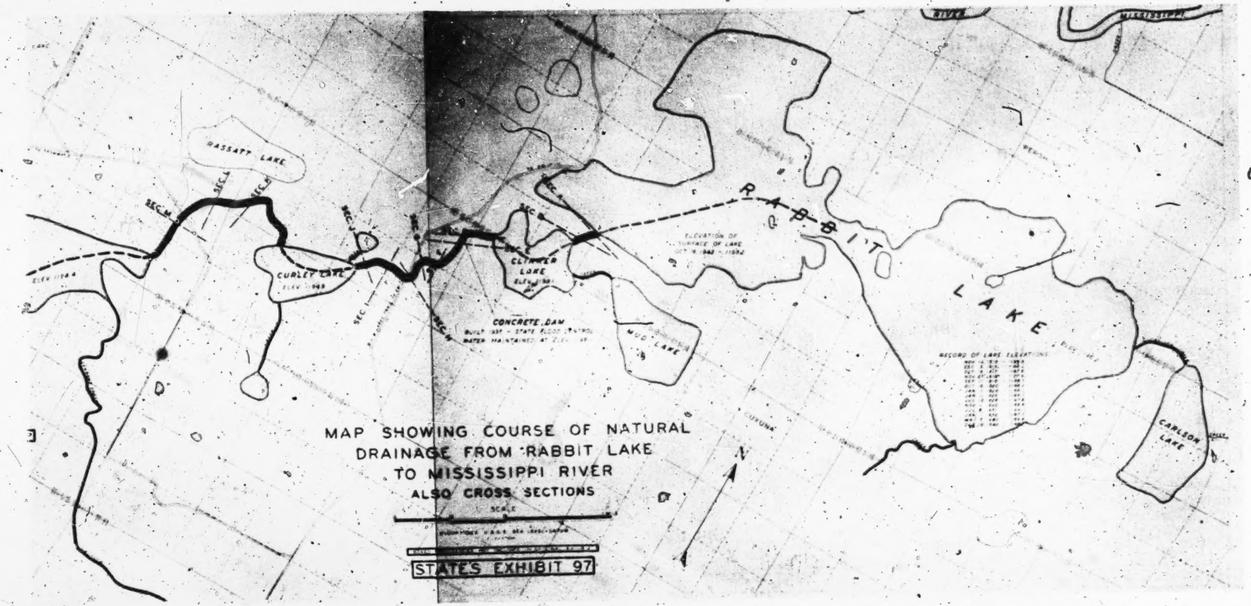
TROMMALD
ELEV 1185
ELEV 1185
JOUE LAKE
MAHNOMEN
YOUNGSTOWN MINES CORPORATIO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SEC 27
SEC 28
SEC 29
SEC 30
SEC 31
SEC 32
SEC 33
SEC 34
SEC 35
SEC 36
CURLEY LAKE
ELEV 1185
CLIMBER LAKE
ELEV 1185
CONCRETE DAM
MUD LAKE
RABBIT
LAKE
CARLSON LAKE
MAP SHOWING COURSE OF NATURAL
DRAINAGE FROM RABBIT LAKE
TO MISSISSIPPI RIVER
ALSO CROSS SECTIONS
SCALE
STATE'S EXHIBIT 97

T 47 N. R. 29 W.

T 47 N. R. 28 W.

T 46 N R. 29 W.

T 46 N. R. 28 W.

T 46 N. R. 30 W.

MISSISSIPPI RIVER

RABBIT LAKE

CLINKER LAKE

BIG EDDY RAPIDS

LEGEND

DESCRIPTION	KEY	COLOR
WHITE PINE		
NORWAY PINE	P	
RED PINE	R	
HARDWOOD	H	
ASPEN-POPLAR	A	
CEDARS	C	
BRUSH	B	
SCATTERED TIMBER	S	
HEAVY TIMBER	T	
CLEARED AREA		
CREEK OR BROOK		
BOULDER - BLUFFS		
MARSH	M	
SWAMP		
WET MARSH	W	
OPEN	O	
LAKES - PONDS		
STATE ROADS		
OLD LOGGING AREAS		
INDIAN PORTAGES		

RABBIT RIVER CHAIN AND VICINITY

FROM GOVT. PLATS AND NOTES

SCALE: 1" = 20 CHAINS

DATES - 1856 - 1870

STATES EXHIBIT 95

ENLARGED PORTIONS OF

BRAINERD QUADRANGLE ----- STATE'S EXHIBIT 75
CUYUNA QUADRANGLE ----- STATE'S EXHIBIT 76
DEERWOOD QUADRANGLE - DEFENDANT'S EXHIBIT 107

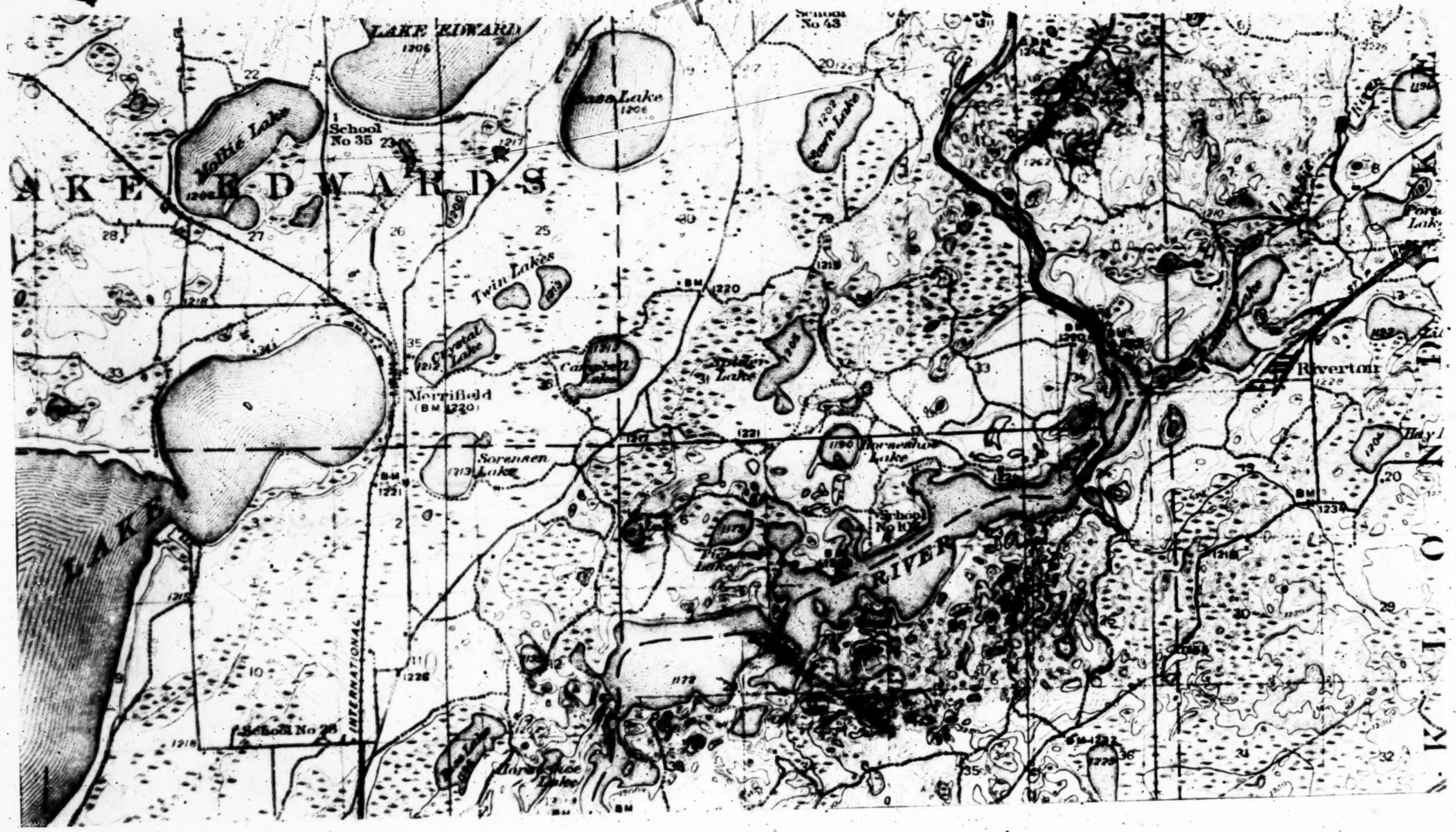
U.S. GEOLOGICAL SURVEY
DEPARTMENT OF THE INTERIOR

AND

STATE OF MINNESOTA REPRESENTED BY THE
DEPARTMENT OF DRAINAGE AND WATERS

CONTOUR INTERVAL 10 FEET

MEAN SEA LEVEL DATUM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LAKE KIWARA
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Twin Lakes
Crystal Lake
Campbell Lake
Spider Lake
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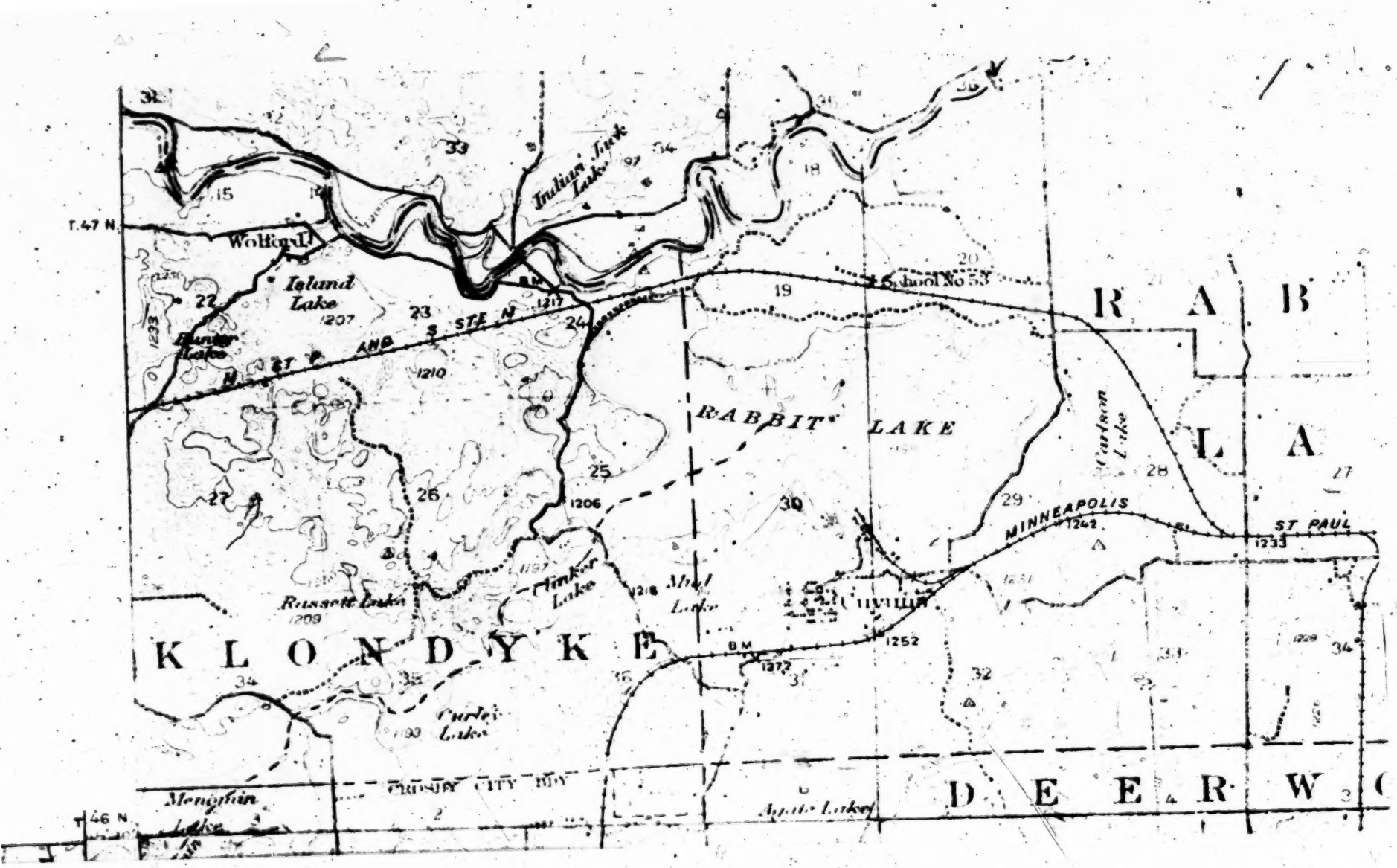
Sorensen Lake
Riverton
RIVER
School No 10
Pine Lake
INTERNATIONAL
School No 28
School No 43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Island Lake
Hunter Lake
Indian Jack Lake
School No 53
RABBIT LAKE
Carlson Lake
Rossette Lake
Tinker Lake
Shed Lake
Circle Lake
Memphis Lake
Agate Lake
MINNEAPOLIS
ST PAUL
1242
1233
1206
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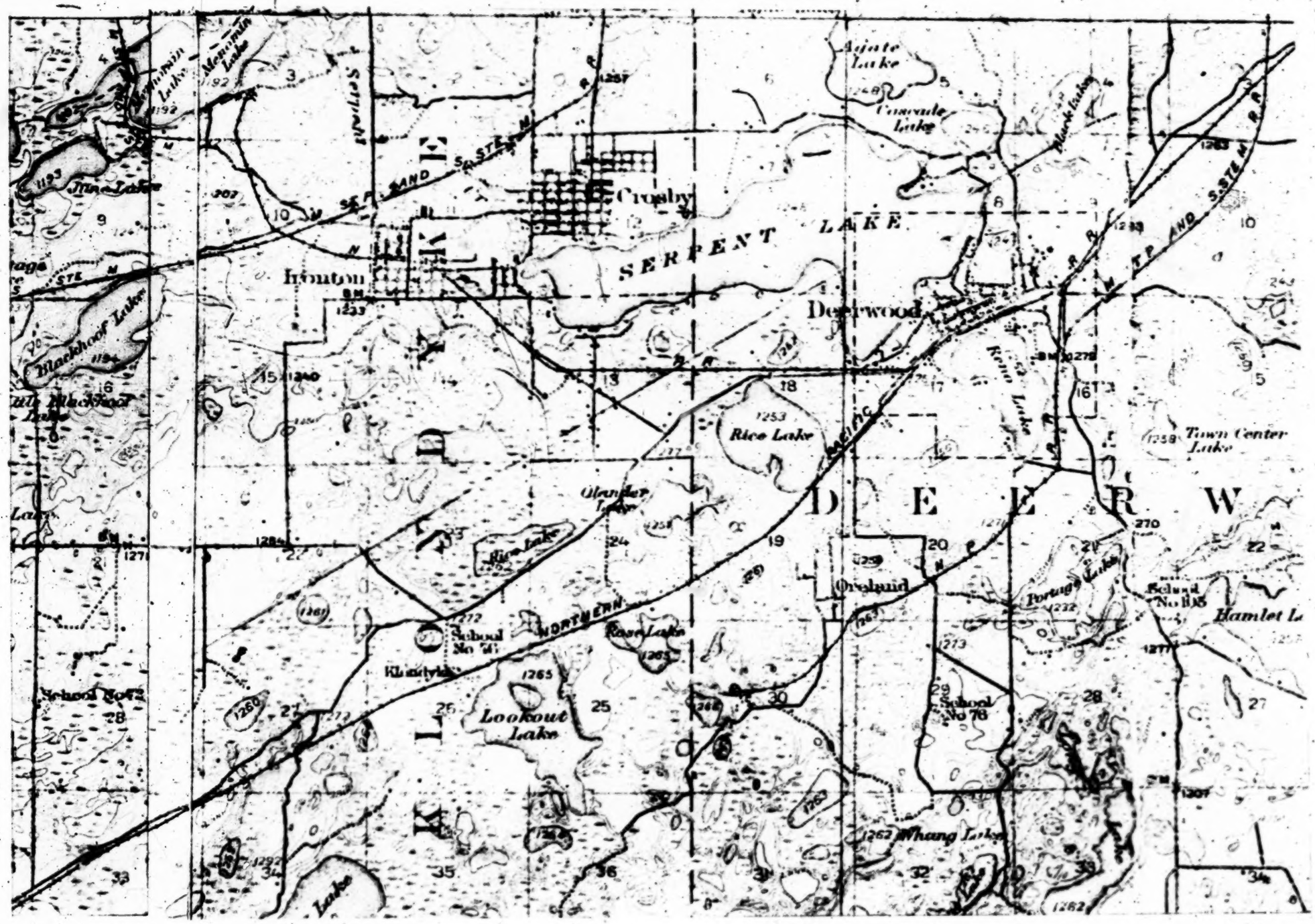
1207
1209
1252
1272
BM
KLONDYKE
RAB
LA
DEER
PRIORITY CITY MDV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Crosby
Ironton
Deerwood
Rice Lake
Lookout Lake
Whang Lake
Town Center Lake
Hamlet
Blackhoof Lake
Mountain Lake
Aspen Lake
Crescent Lake
Black Lake
Portage Lake
Rose Lake
Oreland
School No 41
School No 78
School No 135
NORTHERN PACIFIC
S.T.P. AND S.STE.M. R.R.
D E E R W

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 198

STATE OF MINNESOTA
Petitioner

vs.

ROBERT MORFORD ADAMS, ET AL.
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota

BRIEF IN OPPOSITION TO THE PETITION

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In the
Supreme Court of the United States

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STATE OF MINNESOTA

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Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota

BRIEF IN OPPOSITION TO THE PETITION

OPINIONS BELOW

The opinions of the Supreme Court of Minnesota are reported, unofficially, in 89 N. W. 2d pp. 23, 57, and are attached to the Petition for Certiorari[1] as Appendix A. The findings of fact of the trial court are printed in the record[2] (R. Vol. V, pp. 9-17, 47-56, 74-83, 104-114, 135-146).

[1] Hereafter referred to as "Pet.".

[2] Hereafter referred to as "R".

JURISDICTION

The first opinion of the Supreme Court of Minnesota was filed on June 28, 1957. A petition for rehearing was denied by an opinion filed March 14, 1958. Judgment was entered on April 23, 1958. The petition for a writ of certiorari was filed on July 22, 1958. The jurisdiction of this Court is invoked under *28 U. S. C.* 1257 (3).

QUESTIONS PRESENTED

1. Whether the title claimed by petitioner is specially set up or claimed under the Constitution of the United States or any statute of the United States so as to give this Court jurisdiction.

2. Whether petitioner has not foreclosed itself by taking a position exactly opposite to that upon which it commenced, tried and appealed the cases.

3. Whether, in any event, the courts of Minnesota were not correct in applying the federal test of navigability.

4. Whether this Court will review questions of fact passed on by two courts below.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

It is claimed by petitioner that Article IV, Sec. 3 of the Constitution of the United States is involved. It is also claimed that Act of May 11, 1858, *11 Stat.* 285 is involved. They are set forth in Appendix C of the Petition (Pet. App. C, pp. 95-97).

STATEMENT

These actions, which were consolidated for the purpose of trial (R. Vol. I, pp. 3-6) were brought by the State of Minnesota to quiet title to the beds of certain lakes and the connecting streams. They were brought in the usual statutory form. The complaint in each case alleged that the waters involved were navigable on May 11, 1958, the date of the entry of Minnesota into the Union, and alleged that upon such admission as a sovereign state plaintiff became the owner of the beds of said waters (Pet. App. B, pp. 82, 84). The relief prayed for was that the state be adjudged the owner in fee of the lake beds and the iron ore therein and that it have the right to drain said waters without the consent of the numerous defendants who were the owners of all lands riparian to the waters (Pet. App. B, p. 85).

The trial court found that all of the lakes except Little Rabbit Lake were not navigable on May 11, 1858 and that therefore the state was not the owner of the beds. It found Little Rabbit Lake was navigable and that therefore the state was the owner of the bed of that lake (R. Vol. V, pp. 9-176).

After motions for amended findings or for a new trial (R. Vol. V., pp. 18-194) the state appealed to the Minnesota Supreme Court which affirmed the trial court's findings (Opinion, Pet. App. A, pp. 23-56). A petition for a rehearing was denied by an opinion filed March 14, 1958 (Pet. App. A, pp. 57-77).

In deciding the cases both courts applied the so-called federal test of navigability which had previously been adopted by the Supreme Court of Minnesota (Findings of trial court, Pet. App. B, pp. 86-94, Opinions of Supreme Court, Pet. App. A, pp. 23-77).

ARGUMENT

I.

The title claimed by petitioner did not arise out of any constitutional provision or statute and, therefore, this court has no jurisdiction.

Petitioner invokes the jurisdiction of this Court under *28 U. S. C.* 1257 (3) by asserting that it claims title under Article IV, Sec. 3 of the Federal Constitution and the Act of May 11, 1858, *11 Stat.* 285 (Pet. pp. 3, 4). This claim requires proof, somewhere in the record, that the rights and title so asserted were at all stages of the proceedings "specially set up or claimed" to have arisen out of those constitutional and statutory provisions—otherwise no federal question is involved.

The record establishes beyond any question that petitioner never, either in the trial court or in the Supreme Court of Minnesota, claimed any right or title under the Constitution or statutes of the United States but, on the contrary, based its claim solely and exclusively on the sovereignty of the State of Minnesota. This appears from the complaint in the Big Rabbit Lake case in which the only allegation of ownership or source of title is set forth in these words (Pet. App. B, p. 84):

> "That plaintiff, upon admission to the United States as a sovereign state, became the owner of and ever since has been, and now is, the owner in fee simple of all that portion of the bed of Rabbit Lake below ordinary low-water mark, * * *."

The allegations of title and ownership in the other cases were in the same words.

Likewise, when petitioner appealed to the Supreme Court of Minnesota, no claim was ever made that the title

to the lands arose out of any constitutional or statutory provisions; no assignment of error in any way attempts to set up any right or title under the Federal Constitution or statutes. On the contrary, the only assignments of error were that the evidence did not sustain the findings of fact (Opinion of Minnesota Supreme Court, Pet. App. A, p. 26).

When it filed its petition for a rehearing in the Supreme Court of Minnesota petitioner again failed to assert any right or title under the Federal Constitution or statutes. On the contrary, it then abandoned its initial theory that the waters were navigable under the federal test of navigability and claimed that the courts should have applied some more liberal state test. This shift of position is noted in the opinion of the Minnesota Supreme Court denying the rehearing where the Court said (Pet. App. A, p. 61):

> "But as to applicable legal principles, the state now takes the position that the *Federal* tests for determining navigability of waters should *not* have been applied, but that some more liberal *state* rule should govern therein."

Indeed, petitioner is now asserting that its claim in its petition for rehearing was based upon the proposition that the state law governed, when it says (Pet. p. 7):

> "On petition for reargument, the State claimed that the Court had misconstrued the federal test of navigability and in addition urged that the question raised by the pleadings was not controlled by federal decisions, *but rather that it was determinable by the law of the State.*" (Emphasis supplied.)

It is an actual fact that petitioner, which is now claiming that its title arose out of specific constitutional and statutory provisions so as to bring it within the purview

of *28 U. S. C.* 1257 (3), *never so much as mentioned either of those provisions in the trial court and Minnesota Supreme Court until it filed its petition for rehearing.* Then, in that petition for rehearing the statute, Act of May 11, 1858, *11 Stat.* 285 *was never cited or discussed in any way* and Art. IV, Sec. 3 of the Federal Constitution was cited *only to show that no constitutional question was involved but that the claimed title arose out of the sovereignty of the state* (Petition for rehearing, Part II, pp. 27, 28).

By reason of the foregoing state of the record it is apparent that petitioner never claimed title under the Consituation or statutes of the United States but that its only claim at all times was based upon its inherent sovereignty. This brings the question of jurisdiction squarely within the holding of this court in *Iowa v. Rood,* 187 U. S. 87. The facts and claims in that case are identical with the facts and claims here. The State of Iowa claimed title to the bed of a lake by reason of its sovereignty; the Iowa court found the lake to be unnavigable and held against the state. The state then came to this court by writ of error claiming that this court had jurisdiction because the title arose out of Art. IV, Sec. 3 of the Federal Constitution and out of Act of Dec. 28, 1846, *9 Stat.* 117, which latter act is in all respects identical with Act of May 11, 1858, *11 Stat.* 285 upon which petitioner relies in this case. This court dismissed for want of jurisdiction upon the ground that the title of the state to the lake bed, if any, did not arise out of the Constitution or statute but out of the rules of sovereignty long antedating the Constitution and statute saying, p. 90:

> "This clearly does not involve the validity of any treaty or statute of the United States, or the consti-

> tutionality of any state statute or authority, so that, if jurisdiction exists in this court, it must be by reason of the claim of a title, right, privilege, or immunity under the Constitution, or an authority exercised under the United States, the decision of which was against such title, right, privilege or authority."

and on page 91:

> "This would not involve a construction of the Constitution, nor of any title derived thereunder, but a determination of the title of the Crown to lands beneath the beds of inland lakes, and of the respective rights of the states and the general government as successors thereto."

That case is decisive of the jurisdictional question here.

It is apparent that petitioner has confused the question of federal law as a basis of jurisdiction with federal law incidentally involved in the suit. In the words of the Court in *Gully v. First National Bank In Meridian*, 299 U. S. 109.

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit."

Also, see *State of South Carolina v. South Carolina E & Gas Co.*, 41 F. Supp. 111.

II.

Petitioner cannot change its theory in this court.

A party cannot try a case on one theory and, on review, reject that theory and substitute another. This court will not entertain a theory contrary to that on which the case was tried. When both parties try a case on one theory that theory cannot be rejected in an appellate court.

State of Ohio v. Swift & Co., 260 U. S. 146;

San Juan Light & Transit Co. v. Requena, 224 U. S. 89;

Virtue v. Creamery Package Mfg. Co., 227 U. S. 8;

Virginian Ry. Co. v. Mullens, 271 U. S. 220.

Petitioner is now claiming that the State Courts were in error in applying a test of navigability which follows the federal tests (Pet. p. 3, Opinion of Minnesota Supreme Court, Pet. App. A, p. 61). The fact is that petitioner itself chose, urged and applied that exact test in both the trial court and the Minnesota Supreme Court.

Petitioner has attached to the petition only the complaint in the Big Rabbit Lake case (Pet. App. B, p. 81) which merely alleges the lake to be navigable (Pet. p. 81). However, the complaints in each of the other five consolidated cases allege specifically:

> "That on May 11, 1858, said Clinker Lake and said stream connecting Clinker Lake and said Curley Lake, also known as Turner Lake, in their natural and ordinary conditions were susceptible of being used as highways for commerce over which trade and travel was or could have been conducted in the customary mode of trade and travel on water."

A copy of the Clinker Lake complaint is attached hereto as Appendix A. The other four complaints use identical language.

The reason for the difference in the allegations of navigability in the Big Rabbit case and the other five cases is apparent from the history of the litigation. The Big Rabbit complaint (Pet. App. B, p. 81) was drawn in 1944 while the other cases were started in 1948 and 1949. In the meantime *State v. Longyear Holding Co.*, 224 Minn. 451, 29 N. W. 2d 657 (appeal dismissed *Longyear Hold-*

ing Co. v. Minnesota, 336 U. S. 948), was decided. Obviously, after the decision in *Longyear*, petitioner realized that the State of Minnesota had adopted the rule that the so-called federal tests govern and that it must plead and prove facts sufficient to bring the waters within those tests of navigability. Whatever its reason, petitioner did plead the exact definition of the federal test as laid down by this Court in *United States v. Holt State Bank*, 270 U. S. 49, and as adopted by the Minnesota Court in *State v. Longyear, supra*, as well as several other cases hereinafter cited. Issue was joined and the cases tried and decided on the very theory chosen by petitioner (Trial Court's findings, Pet. App. B, pp. 90, 93, 94).

Petitioner then appealed to the Minnesota Supreme Court and on that appeal it still insisted that the federal test of navigabiliy was the only and proper test (Opinion denying petition for rehearing, Pet. App. A, p. 70). Actually, one of its assignments of error was as follows:

> "The District Court erred in failing to hold that Rabbit Lake was, on May 11, 1858, a navigable body of water under the federal rule or test of navigability" (Appellant's Brief, pp. 44, 53, 62, 72, 81).

In its brief on the appeal to the Minnesota Supreme Court petitioner still insisted that the federal test of navigability was the only proper test (Opinion denying petition for rehearing, Pet. App. A, p. 70). Furthermore, petitioner had claimed title to lake beds in three other cases decided by the Minnesota Supreme Court and in each of those cases had specifically insisted that the federal test of navigability applied (Opinion denying petition for rehearing, Pet. App. A, pp. 67-70). Not only did petitioner take that position in those cases but it successfully moved to dismiss an appeal in this Court in a case involving the

same question on the ground that no federal question was involved. *Longyear Holding Co. v. State of Minnesota*, 336 U. S. 948.

Petitioner, then, is in the position of having urged the federal test of navigability in the two courts below and is now claiming error in this Court because those courts tried and decided the cases on the theory which petitioner chose. That position cannot be sustained under any rule.

Petitioner now seems to argue that, although it did so urge twice in the courts below, it has purged itself of the consequences by changing its theory on its petition for a rehearing and has thus raised a federal question in time to give this Court jurisdiction (Pet. p. 11). The fact is that its petition for rehearing was based solely upon the proposition *that the court should have applied some state rule of navigability and that no federal question was involved* (Petition for Rehearing, Parts I and II). Granting that the petition for rehearing is confusing and somewhat obscure, the fact remains that the Minnesota Supreme Court so interpreted it in its opinion denying the rehearing when it said (Pet. App. A, p. 61):

> "But as to applicable legal principles, the state now takes the position that the *Federal* tests for determining navigability of waters should *not* have been applied, but that some more liberal *state* rule should govern therein."

Furthermore, petitioner which now claims a federal question is involved because it raised it in its petition for rehearing specifically claimed, in that petition, that there was no federal question. It said (Petition for Rehearing, Part II, p. 20):

> "The decision is in conflict with controlling cases, which hold that a contest over title to submerged

> land under a federal patent does not, in the circumstances of this case, raise a question determinable according to federal law."

It followed that statement with these words (Petition for Rehearing, Part II, p. 21):

> "The property claimed here was not expressly included in the patents under which claimants deraign title. *Hence no issue is raised relative to the power or validity of an act done by the United States. Therefore, no federal question is presented.*" (Emphasis supplied.)

The only conclusion that can be reached from this amazing sequence of inconsistencies is as follows: Petitioner itself chose the theory of law on which the case was tried and decided by the trial court and affirmed by the Supreme Court. Petitioner then asked for a rehearing on the ground that no federal question was involved and that the cases should have been decided on some unknown state test of navigability. When that petition was denied it now asks this court to take jurisdiction on a ground that it expressly rejected in its last effort in the state court. If petitioner reverts to its original claim that its title arose of its sovereignty, the writ cannot be granted because the title is not claimed under the Constitution or statutes of the United States, and upon the further ground that it chose the theory on which the cases were tried. If it adheres to the theory claimed in the petition for rehearing, namely that the court should have decided the facts under some state rule of navigability, the writ cannot be granted because that is a question of state law over which this court has no jurisdiction.

III.

This court has repeatedly refused jurisdiction in cases involving the navigability of waters.

Whatever else may be said about the question of jurisdiction it appears that this Court, absent any claim of deprivation of property under the Federal Constitution, has consistently refused jurisdiction in cases involving the navigability of waters.

Illinois v. Economy Light and Power Company, 234 U. S. 497;
Egan v. Hart, 165 U. S. 188;
Chapman & Dewey Land Co. v. Bigelow, 206 U. S. 41;
Norton v. Whiteside, 239 U. S. 144;
Bird v. Ashton, 220 U. S. 604.

IV.

The state court applied the proper test of navigability.

As we read the petition the claim is this: the state courts were in error in applying the federal test of navigability because the issue was whether or not the defendant, as an incident of their patents, received the submerged lands. That issue is stated in these words (Pet. p. 14):

> "The issue in this case is whether the riparian patentees received, as an incident of their patent, the adjoining submerged lands, not whether the United States relinquished the beds of these waters to Minnesota in 1858."

This is a gross misstatement of the issue. The question was not whether the riparian owners had title but whether the state had title. In its complaint petitioner alleged that

it had title by reason of its sovereignty (Pet. App. B, p. 84), and under the law of Minnesota it was bound to prove its own title, not the weakness of the defendants' title. *Herrick v. Churchill,* 35 Minn. 318. Petitioner, in support of its claim of title, chose to rest it upon the basis of state sovereignty which, in turn, rested upon the federal test of navigability chosen by petitioner. Since the federal test is the only one by which the state could get title, and since petitioner voluntarily chose it, that test became the issue on which the strength of petitioner's title was tried and decided.

It requires no extended discussion to demonstrate that the federal test of navigability is the only test that can be applied in a case such as this. The question was forever settled in *United States v. Holt State Bank,* 270 U. S. 49, p. 55 where this Court said:

> "Both courts below found that the lake was navigable. But they treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota. We think they applied a wrong standard. Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts."

This point was affirmed in *United States v. Oregon,* 295 U. S. 1. This test had been adopted by the Supreme Court of Minnesota as the law of Minnesota in several cases prior to this case. *State v. Longyear Holding Company,* 224 Minn. 451, *Becker v. Shevlin Land Company,* 186 Minn. 401, *Bingenheimer v. Diamond Iron Mining Company,* 237 Minn. 332, *State ex rel. Burnquist v. Bollenbach,* 241 Minn. 103.

The record here shows that both courts below properly applied the rule of navigability laid down in the above cases (Findings of trial court, Pet. App. B, pp. 86-94, Opinion of Supreme Court, Pet. App. A, pp. 23-56).

V.

The state courts correctly applied the state law.

Whether the state courts correctly applied the state law of riparian rights does not raise any question in this Court unless such law contravenes some provision of the Federal Constitution or statutes—of which petitioner makes no claim. However, the fact that the state courts did properly construe and apply the state law of riparian rights is made abundantly clear by the opinions of the Minnesota Supreme Court (Pet. App. A, pp. 23-56, 57-77).

The only possible basis for any claim of title in the state to the beds of these waters is that they were navigable waters, and that the state acquired title thereto upon admission to statehood in 1858. There is no basis for the suggestion that, even if the waters were nonnavigable under federal tests, the state acquired title to the submerged lands at the time of the issuance of patents, under the guise of construing the patents. That has never been the law of Minnesota, and throughout these proceedings, petitioner made no claim that such was the law of Minnesota. The Supreme Court of Minnesota, throughout its history, has consistently held that riparian proprietors own the beds of nonnavigable lakes (Opinion denying rehearing, Pet. App. A, p. 77 and cases cited).

Lamprey v. State, 52 Minn. 181;
Shell v. Matteson, 81 Minn. 38;
Hanson v. Rice, 88 Minn. 273;

Tucker v. Mortenson, 126 Minn. 214;
Schmidt v. Marschel, 211 Minn. 539.

Petitioner cannot point to any decision of the state court which, in the words of this Court in *United States v. Oregon*, 295 U. S. 1, p. 28, holds "that a grant to individual upland proprietors impliedly grants to the state the adjacent land under water." Nor can petitioner now rely on any statute of the State of Minnesota. Even if it could, contrary to the holding of this Court in *United States v. Oregon*, 295 U. S. 1, claim navigability under a state statute, the fact is that petitioner never made any such claim at any stage of the proceedings. The Minnesota statute, *1 Minn. Stat.* 93.06, which is cited on page 4 of the Petition *was never mentioned at any stage of the proceedings including the petition for rehearing.* Indeed, we do not now read the Petition as making any claim under that statute.

Petitioner is now insisting that this Court has jurisdiction because the state court was wrong in applying the federal test of navigability; it insists that the state court could choose its own rule of navigability and should have chosen what petitioner calls the state rule. But petitioner has never pointed out to any court (including this Court) what the so-called state rule is or that it differs from the federal rule. The fact is that in every case in the Minnesota Supreme Court *involving a question of title* between the state and riparian owners, excepting *Lamprey v. State*, 52 Minn. 181, that court has specifically applied the federal test of navigability. In *Lamprey* the title was held to be in the riparian owners and the discussion of navigability was dictum concerning only the *right of the public to use the waters*. Each time the question of *title* to submerged

lands has been in issue the Minnesota Supreme Court has consistently applied the federal test and each time it has applied that test at the specific urging of Petitioner (Opinion denying rehearing, Pet. App. A, pp. 67-70).

State v. Longyear Holding Co., 224 Minn. 451;
Bingenheimer v. Diamond Iron Mining Co., 237 Minn. 332;
State v. Bollenbach, 241 Minn. 103;
State v. Adams, 89 N. W. 2d 661.

It would seem to follow that if petitioner is correct in saying that the test of navigability is purely a state question and that the state can choose its own test of navigability, the state has so chosen, both through its Attorney General and through its Supreme Court. If the state had such a choice it certainly could choose the federal test if it so desired. Having made such a choice (which petitioner says is a state question) no federal question exists and this Court has no jurisdiction. Petitioner cannot have it both ways.

VI.

The writ should not be granted to review the questions of fact.

It is difficult to determine from the petition whether petitioner is asking this Court to review the question of fact decided by both courts below (Pet. pp. 3, 18). Out of some two thousand pages of testimony and out of 179 Exhibits there are attached to the petition only a few Exhibits which, on any basis, are relatively unimportant to the ultimate findings of nonnavigablity.

It is neither desirable nor necessary to discuss and dissect the fact question in this brief. It should suffice to say that a reading of the findings of the trial court (Pet. App. B, pp. 86-94) and the exhaustive opinion of the Minnesota Supreme Court (Pet. App. A, pp. 23-56) demonstrate beyond question that the findings were supported by the evidence. Indeed, it would be difficult to sustain a contrary finding under any test of navigability, federal or other.

The rule that this Court will not grant certiorari to review questions of fact is supported by the following cases:

Dower v. Richards, 151 U. S. 658;
Egan v. Hart, 165 U. S. 188;
Marshall Dental Manufacturing Company v. State of Iowa, 226 U. S. 460;
Illinois v. Economy Light & Power Company, 234 U. S. 497.

The statement of petitioner that the right of the public to use the *waters* is involved is a misstatement of this issue. At all times it was conceded that the question of public use of the waters was never an issue in the cases (Respondents' Brief in answer to petition for rehearing, pp. 81-94) and in both opinions of the Minnesota Supreme Court this point was emphatically stated (Pet. App. A, pp. 56, 77).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

State of Minnesota, District Court.
County of Crow Wing. 15th Judicial District.

State of Minnesota,

Plaintiff,

vs.

Adams Holding Company, a corporation, et al.,

Defendants.

Complaint

Plaintiff for its cause of action alleges:

I.

That Clinker Lake is a navigable body of water situated in the County of Crow Wing, Minnesota, and bounded by by the following tracts of land, viz.: The Southwest Quarter of the Southwest Quarter (SW¼ SW¼), Lot Six (6), or the East One-half of the Southwest Quarter (E½ SW¼), Lot Seven (7), or the West One-half of the Southeast Quarter (W½ SE¼), all in Section Twenty-five (25); and, the Northwest Quarter of the Northwest Quarter (NW¼ NW¼), the Northeast Quarter of the Northwest Quarter (NE¼ NW¼), and the Northwest Quarter of the Northeast Quarter (NW¼ NE¼), Section Thirty-six (36), all in Township Forty-seven (47) North, Range Twenty-nine (29) West of the 4th Principal Meridian, which tracts of land were on May 11, 1858, ever since said time have been, and now are riparian to said Clinker Lake,

and that the outlet stream from Clinker Lake extending through the Northwest Quarter of the Northwest Quarter (NW¼ NW¼) of Section Thirty-six (36), the Northeast Quarter of the Northeast Quarter (NE¼ NE¼), the Southeast Quarter of the Northeast Quarter (SE¼ NE¼), the Southwest Quarter of the Northeast Quarter (SW¼ NE¼), and the Southeast Quarter of the Northwest Quarter (SE¼ NW¼) of Section Thirty-five (35), Township Forty-seven (47) North, Range Twenty-nine (29) West of the 4th Principal Meridian, which empties into Curley Lake also known as Turner Lake, was, during all of the time aforesaid, a navigable stream connecting said Clinker Lake and said Curley Lake, also known as Turner Lake; that on May 11, 1858, said Clinker Lake and said stream connecting Clinker Lake and said Curley Lake, also known as Turner Lake, in their natural and ordinary conditions were susceptible of being used as highways for commerce over which trade and travel was or could have been conducted in the customary mode of trade and travel on water.

II.

That the defendant Adams Holding Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Arketah Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Cuyler Culver Adams is the administrator of the estate of Virginia C. Adams; that the Cuyuna Mining and Investment Company is a corporation organized and existing by virtue of the laws of the State of Delaware, and authorized to conduct its business within the State of Minnesota; that defendant James F. Gibbon is the duly appointed receiver for the Northern Minnesota Ore Company, a corporation,

organized and existing by virtue of the laws of the State of Minnesota; that the defendant The Gregory Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendants Thomas F. Comerford, Patrick O'Brien, Edward Feigh, John Feigh, and Thomas H. Murray are the duly appointed trustees under the last will and testament of Thomas Feigh, deceased; that the defendant Immigration Land Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Monakee Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant North Star Land Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Northern Minnesota Ore Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Northern Pacific Railroad Company is a corporation organized and existing by virtue of the laws of the State of Wisconsin and authorized to conduct its business in the State of Minnesota; that the defendant Onondaga Iron Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Pine Land Lumber Company is a corporation organized and existing by virtue of the laws of the State of Delaware and authorized to conduct its business in the State of Minnesota; that the defendant E. L. Trask Corporation is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant Winston Bros. Company is a corporation organized and existing by virtue of the laws of the State of Minnesota; that the defendant the Youngstown Mines Corporation is a corporation organized and existing by virtue of the laws of the State of West Virginia

and authorized to conduct its business in the State of Minnesota.

III.

That plaintiff, upon admission to the United States as a sovereign state, became the owner of and ever since has been, and now is, the owner in fee simple of all that portion of the bed of Clinker Lake below ordinary low-water mark, and the owner of that portion of the river bed of the stream connecting Clinker Lake and Curley Lake, also known as Turner Lake, lying and being below the ordinary low-water mark, and during all of the period of time aforesaid was and is the sole owner of all iron ores and other minerals on, in, or under said lands, together with the right to enter upon said lands and explore for, mine and remove such iron ore and other minerals, and the right to lease or otherwise dispose of said lands and such iron ores and other minerals, together with the right to regulate, control and divert the water covering said beds, and that the defendants have no right, title, or interest therein.

IV.

That the defendants and each of them claim estates or interests in or liens thereon adverse to the plaintiff.

Wherefore plaintiff prays judgment that it is the owner in fee simple of such lands constituting the lake bed of Clinker Lake and the river bed of the stream connecting Clinker Lake and Curley Lake, also known as Turner Lake, as aforesaid, and the sole owner of all iron ores and other minerals on, in, or under said lands, together with the exclusive right to enter on said lands and explore for and remove such iron ore and other minerals, together with the right to regulate, control, and divert the waters

of Clinker Lake, and that the defendants and none of them have any estate or interest in or lien upon said lands, or the iron ores or other minerals thereon, or thereunder, and for its costs and disbursements herein.

Dated March 24th, 1949.

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1958

No. 198

STATE OF MINNESOTA,

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ROBERT MORFORD ADAMS, ET AL.,
THE ADAMS CORPORATION, ET AL.,
ADAMS HOLDING COMPANY, ET AL.,
BYRON H. COOLIDGE, ET AL.,
THE ADAMS CORPORATION, ET AL.,
ROBERT M. ADAMS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota

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IN THE

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ROBERT MORFORD ADAMS, ET AL.,
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THE ADAMS CORPORATION, ET AL.,
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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota

REPLY OF PETITIONER

The question presented on appeal to the court below was the sufficiency of the evidence to establish navigability under the federal law. When that question was decided against the state, the court was asked on petition for rehearing: (a) to reconsider whether it had applied to the facts found

the correct legal test of navigability as formulated by this Court; (b) to decide that federal law was not controlling and that local law should have governed the decision. The court considered and determined both of these questions against the claims of petitioner. The point is made because it appears that in their brief in opposition herein respondents have failed to perceive that both questions are preserved and presented for review.

I

The Court Below Assumed the Existence of a Federal Question and Rested Its Decision on Federal Grounds.

The ultimate issue in this case is whether the riparian owners or the state owns the beds of certain lakes and streams lying wholly within the State of Minnesota. It was stipulated that navigability would determine the question. (Pet. App. A, p. 25) The court found the waters non-navigable and "title to the beds therefore in the riparian owners * * *." (Pet. App. A, p. 25) In affirming the district court, the court below, on the authority of *United States v. Holt State Bank*, 270 U. S. 49, declared:

> "* * * Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts." (Pet. App. A, p. 27)

The syllabus in part states: "Question of navigability is to be determined by Federal law." (Pet. App. A, p. 24)

In its opinion denying the petition for rehearing, the court below declared again that a federal right was asserted

and that federal law was controlling upon that right. (Pet. App. A, pp. 63-75) The court said:

> "* * * the conclusion is inescapable that what Minnesota owned in its sovereign capacity as a state upon admission to the Union and what was retained by the United States as part of the public domain clearly involves a Federal question." (Pet. App. A, p. 74)

The court then stated that:

> "Inasmuch as this court correctly applied the tests for navigability formulated by the Federal courts *in the opinion previously filed herein,* there can be no reason for granting a rehearing on the issue of applicable law." (Pet. App. A, p. 75) (Emphasis by the court.)

Part I of respondents' brief in opposition to the petition for certiorari asserts that petitioner's claim did not arise out of a federal statute or constitutional provision, that no federal question is presented, and that this Court, therefore, is without jurisdiction to review under 28 U.S.C. § 1257(3). In Part IV of their brief in opposition herein, respondents repeat the quotation from the *Holt State Bank* case, noted *supra*, in support of the proposition that the state court applied the proper test of navigability.

As it clearly appears that the court below rested its decision against petitioner solely upon the determination of a federal question, this Court has jurisdiction to review. *Murdock v. City of Memphis*, 87 U. S. (20 Wall.) 590; *Virginia v. Imperial Coal Sales Co., Inc.*, 293 U. S. 15, 16; and see *Herb v. Pitcairn*, 324 U. S. 117. Where a state court disposes of a case before it solely by the interpretation of federal law, a federal question is presented. *Standard Oil Co. v. Johnson*, 316 U. S. 481; compare *S. R. A., Inc. v. Minnesota*, 327 U. S. 558. It is unnecessary to determine

how or when a federal question was raised in a state court when it appears that the question was actually considered and decided, and that the decision was necessary to the court's disposition of the case. *Manhattan Life Ins. Co. of New York v. Cohen*, 234 U. S. 123, 134; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 83 (1951). If the record as a whole shows that a claimed federal right was brought to the court's attention, the federal question is recognized as adequately presented. No particular form of words is necessary. *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67-79; *Green Bay & Miss. Canal Co. v. Patten Paper Co.*, 172 U. S. 58, 67-68.

Iowa v. Rood, 187 U. S. 87, cited by respondents on page 6 of their brief, has nothing to do with the question of jurisdiction in the case at bar. In that case the state had specifically averred that its right to the lake bed "does not depend upon any act of Congress or any grant from the United States." Id. at 92. This Court's refusal of jurisdiction in that case was a recognition, simply, that the decision against the state in the Supreme Court of Iowa rested solely on state grounds. The case was cited later in *Los Angeles Farming & Milling Co. v. City of Los Angeles*, 217 U. S. 217, and *Chapman & Dewey Land Co. v. Bigelow*, 206 U. S. 41. Those cases support petitioner's second contention, rejected by the court below on petition for rehearing, that the ownership of submerged lands within a state is a question of state law.

Nor does respondents' reference to *Gulley v. First National Bank In Meridian*, 299 U. S. 109, cited on page 7 of their brief herein, help them. If that case is cited to show that the case at bar is not "one arising under the Constitution and laws of the United States," then the court below

deprived the state of its property by deciding on federal grounds a right which should have been decided by state law. In that event petitioner is properly here on that issue. *Missouri ex rel. Southern Railway Co. v. Mayfield,* 340 U. S. 1; cf. *Angel v. Bullington,* 330 U. S. 183, 187; *Lyeth v. Hoey,* 305 U. S. 188; *Clearfield Trust Co. v. United States,* 318 U. S. 363.

II

Two Separate and Distinct Federal Questions Were Presented for Decision and Decided by the Court Below Adversely to the Claim of Petitioner. The Same Questions Are Presented by the Petition in This Court.

In its petition for rehearing (Part II, pp. 4-11) and again in this Court (Pet. pp. 12-14) petitioner asserted that the Minnesota supreme court had misconstrued the federal common law of navigability when it held these waters non-navigable. In the opinion denying the petition for rehearing, the court asserted that it had "correctly applied the tests for navigability formulated by the Federal courts" in its first opinion, thus rejecting petitioner's request that it reconsider that issue. (Pet. App. A, p. 75) In its petition here, one of the questions presented by the state for review is whether the court below construed correctly the meaning of navigability as formulated by the Federal courts. (Pet. p. 3) It is apparent, therefore, that respondents err when they assert that the state's "petition for rehearing was based solely upon the proposition *that the court should have applied some state rule of navigability and that no federal question*

was involved." (Emphasis by Resp.) (Resp. brief in opposition herein, p. 10)

Respondents fail to differentiate between petitioner's arguments to the court below on the question of choice of law, as affected by the characterization of the issue presented, *Shoshone Mining Co. v. Rutter*, 177 U. S. 505; *Joy v. City of St. Louis*, 201 U. S. 332; *Board of Commissioners of the County of Jackson, Kansas v. United States*, 308 U. S. 343; *Clearfield Trust Co. v. United States*, supra; *Lyeth v. Hoey*, supra; and see Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L. Q. 499, 515-530 (1928); Cheatham, Goodrich, Griswold, and Reese, *Cases on Conflict of Laws*, pp. 391-395, 533-536 (1951); and the kind of federal question that will permit this Court to exercise its discretionary appellate jurisdiction over decisions of the state courts.

In addition to arguing that the court below had misconstrued the federal test of navigability, the state, in its petition for rehearing, asserted that the question presented by the pleadings was determinable by state law. (Pet. for Rehearing, Part II, pp. 12-67) The court below considered and decided that question adversely to the state (Pet. Apps. A, pp. 61, 64, 74) The characterization of a question as state or federal, see, e.g., *D'Oench, Duhme and Co. v. Federal Deposit Insurance Corporation*, 315 U. S. 447, 455; *Deitrick v. Greaney*, 309 U. S. 190, 201; and the determination whether, in construing the effect of a federally created right, state or federal law will govern is itself a federal question finally determinable only by this Court. *S. R. A., Inc. v. Minnesota*, 327 U. S. 558, 564; *United States v. Allegheny County*, 322 U. S. 174, 183; cf. *Angel v. Bullington*, 330 U. S. 183, 187; *Garrett v. Moore-McCormack Co., Inc.*, 317 U. S. 239; *Palmer*

v. Hoffman, 318 U. S. 109; *Carpenter v. Shaw*, 280 U. S. 363, 367; *Clearfield Trust Co. v. United States*, supra; *Board of Commissioners of the County of Jackson, Kansas v. United States*, supra. That question, though advanced below for the first time in the petition for rehearing, was timely raised because it was actually considered and decided.[1] *Leigh v. Green*, 193 U. S. 79, 85; *Fleming v. Fleming*, 264 U. S. 29, 31. (Pet. herein, pp. 10, 11)

This Court has considered the question whether navigability for the purpose of determining the ownership of land is determinable by state or federal law in *Hardin v. Jordan*, 140 U. S. 371, 382; *Wear v. Kansas*, 245 U. S. 154, 158; *Donnelly v. United States*, 228 U. S. 243, 259-264; *Oklahoma v. Texas*, 258 U. S. 574, 594-595; *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 87; *United States v. Holt State Bank*, 270 U. S. 49, 55; *United States v. Utah*, 283 U. S. 64, 75; and *United States v. Oregon*, 295 U. S. 1, 26-29. Important considerations relating to the appropriate adjustments between the national and state jurisdiction over property within the states, *S. R. A., Inc. v. Minnesota, supra*, supports the need for further clarification of this question; cf. *New York v. United States*, 326 U. S. 572, 574; *Wilson v. Cook*, 327 U. S. 474.

[1] In the district court and in the court below, the state included in its brief both Minnesota cases and decisions of this Court to establish the navigable character of this watercourse.

III

Vacant and Unoccupied Lands Are *Prima Facie* in the Sovereign; Therefore, the Burden Is on the Adverse Claimant to Prove His Title.

In *United States v. Texas*, 339 U. S. 707, 716, this Court reaffirmed the constitutional right of the states to the "ownership of the shores of navigable waters and the soils under them." The jurisdiction of The Bureau of Land Management under the public land laws extends only to public land subject to sale. *Newhall v. Sanger*, 92 U. S. 761, 763. Land within a meander line is excluded from survey and constitutes a withdrawal of such area from the category of lands subject to disposal under the public land laws. *Kean v. Calumet*, 190 U. S. 452, 459-460; *Iowa v. Rood*, supra; *Lee Wilson & Co. v. United States*, 245 U. S. 24, 29. The principle which guides the classification of such areas and which placed their ownership *prima facie* in the crown and therefore in the states, *Pollard's Lessee v. Hagan*, 3 How 212; *Martin v. Waddell*, 16 Pet. 367, is their character "as land not capable of ordinary cultivation or occupation, and so * * * in the nature of unappropriated soil." *Borax, Ltd. v. Los Angeles*, 296 U. S. 10, 25; and see dissenting opinion Frankfurter, J., *United States v. California*, 332 U. S. 19, 43; see also Fraser, *Title to Soil Under Public Waters*, 2 Minn. L. Rev. 313, 325 (1918). Where a state contests a riparian owner's adverse claim to submerged lands, the state may prevail by a decision of its court that, according to its laws, the submerged lands are excluded from private ownership. *Wear v. Kansas*, 245 U. S. 154, 157; and cf. *McGilvra v. Ross*, 215 U. S. 70; *Marshall Dental Mfg. Co. v. State of Iowa*, 226 U. S. 460.

Herrick v. Churchill, 35 Minn. 318, cited by respondents (Brief herein, p. 13), involved an action between private parties. Since the state is the ultimate source of title and creates and enforces rights of property out of its sovereign power, *Pennoyer v. Neff*, 95 U. S. 714, 722; and see Reed, J., dissenting in *United States v. California,* 332 U. S. 19, 41; see also Bannister, *Federal Disposition of State Waters,* 28 Harv. L. Rev. 270, 279-285 (1915), it cannot be said that the state is without "any interest whatever in the property." *Herrick v. Churchill, supra,* at 319. If either title or possession is *prima facie* in the state, then the adverse claimants have the burden either to establish or abandon their claim. *Walton v. Perkins,* 28 Minn. 413; *State ex rel. Beise v. District Court, Blue Earth County,* 150 Minn. 512. As the land in controversy is not included in the original letters patent, whether or not such lands belong to the respondents is a matter of local law. *Joy v. City of St. Louis,* 201 U. S. 332, 342. The court below felt compelled by the decision in *United States v. Holt State Bank, supra,* to decide the case by federal law. It should be relieved of that compulsion by this Court. *Missouri ex rel. Southern Ry. Co. v. Mayfield,* 340 U. S. 1.

IV

The Court Below Did Not Consider the Law of the State in Deciding the Case.

In its first opinion the court below assumed that the basic issue in the case was whether the United States granted to the State of Minnesota, in 1858, the beds of the waters constituting the Rabbit Lake Chain. (Pet. App. A, p. 26) In the opinion denying the petition for rehearing, the court declared again that the question was whether the United States had

relinquished to the state in 1858 the beds of these waters; that this question in turn depended upon navigability of the overlying waters, as a matter of federal law. (Pet. App. A, p. 62) For purposes of res judicata, what a court decides is controlled by the issue presented for decision, not by the question that the court chooses to decide. *Angel v. Bullington, supra*, at 184. Unless this Court grants review, petitioner will be precluded by a determination that the United States did not relinquish to Minnesota these submerged lands in 1858, a question that the Minnesota supreme court did not have the power to decide. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 87; *Oklahoma v. Texas*, 258 U. S. 574, 591; *Economy Light & Power Co. v. United States*, 256 U. S. 113, 123.

The Minnesota rule which denies to riparian owners the beds of waters capable of public use originated in *Lamprey v. State*, 52 Minn. 181, 198-200, and was followed in *Witty v. Board of County Commissioners*, 76 Minn. 286; *Chicago, Milwaukee & St. P. Ry. Co. v. City of Minneapolis*, 115 Minn. 460 (1911); *State v. Korrer*, 127 Minn. 60, 63; *In Re County Ditch No. 34*, 142 Minn. 37, 41; *Nelson v. De Long*, 213 Minn. 425, 431; *Petraborg v. Zontelli*, 217 Minn. 546, 552. *State ex rel. Burnquist v. Bollenbach*, 241 Minn. 103, 117-118, recognized the continued viability of the state test of public waters laid down by Mr. Justice Mitchell in *Lamprey v. State, supra*, even while holding that navigability to determine title is a question of federal law.

The court below conceded that prior to the decision of this Court in *United States v. Holt State Bank, supra*, "it was not always clear what law governed the question of navigability." (Pet. App. A, p. 62) The fact is, however, that *State v. Longyear Holding Co.*, 224 Minn. 451, is the

first case *involving the state* in which the Minnesota supreme court felt compelled to apply federal law to determine navigability and ownership of submerged land."

A public officer cannot "choose [his] own test of navigability" (Resp. brief herein, p. 16) and thereby divest the state of its property. Cf. *United States v. Allegheny County*, 322 U. S. 174, 189; *United States v. California*, 332 U. S. 19, 39. Nor did the court below "choose the federal test" and incorporate it into the common law of the state. Rather, the court felt compelled by decisions of this Court to treat the question as determinable by the test of navigability applied in the federal courts. (Pet. App. A, p. 74)

V

Petitioner Does Not Seek a Review of the Evidence.

Petitioner asserted that the court below applied to the facts found an erroneous interpretation of navigability as that term is understood in the federal courts. (Pet. pp. 12-14) Whether or not undisputed physical and evidentiary facts establish navigability as a matter of federal law, is a question that this Court will review. *United States v. Appalachian Power Co.*, 311 U. S. 377, 403; *United States v. Holt State Bank*, 270 U. S. 49, 55. And this Court has said it will review findings of fact where a conclusion of law as to a federal right and findings of fact are so intermingled that analysis of the facts is necessary in order to pass on the federal question. *Kansas City Southern Ry. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 591.

CONCLUSION

Exclusive territorial jurisdiction, which is the constitutional right of each state, see *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, permitted Justice Mitchell in *Lamprey v. State, supra*, at 199,[2] to fashion a rule of ownership of lakes fitted to Minnesota's unique geography. The people of this state now learn from their supreme court that admission to statehood on an equal footing did not carry with it that exclusive jurisdiction and sovereignty over submerged lands which is the right of the earlier formed states; that the supreme court of this state exceeded its jurisdiction in 1893 when it created a rule of navigability suited to Minnesota's special needs.

On behalf of the people of Minnesota, petitioner respectfully urges this Court to review the decision below which withdraws from our courts and legislature the right to create rules of property over submerged lands within the state. Petitioner urges, too, that this Court review the construction of federal law which resulted in a determination

[2] "Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and, as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. * * *"

that the watercourse involved herein does not meet the test of navigability formulated by this Court.

Respectfully submitted,

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